



**THE PRACTICE IN SELECTED METROPOLITAN MUNICIPALITIES ON
MECHANISMS FOR GREATER OVERSIGHT AND SEPARATION OF POWERS:
A CASE OF CAPE TOWN, JOHANNESBURG AND EKURHULENI
METROPOLITAN MUNICIPALITIES.**

A research paper submitted in partial fulfillment of the requirement of the LLM Degree in the
Faculty of Law of the University of the Western Cape.



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Declaration

I, **YASIN K MAONI**, do hereby declare that this research is my original work and that to the best of my knowledge and belief, it has not previously, in its entirety or in part, been submitted to any other university for degree or diploma. Works of others cited or referred to are accordingly acknowledged.



Signed:

30th May 2013



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Key words

Governance, administration, separation of powers, checks and balances, oversight, accountability, best practices, legislative mechanisms, metropolitan municipalities, executive and legislative functions



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List of abbreviations and/or acronyms

ANC	African National Congress
CoGTA	Department of Cooperative Governance and Traditional Affairs
DA	Democratic Alliance
IDP	Integrated Development Planning
MFMA	Municipal Finance Management Act
MMC	Member of a Mayoral Committee
MPAC	Municipal Public Accounts Committee
SCOPA	Standing Committee on Public Accounts
SDBIP	Service Delivery and Budget Implementation Plan
SPELUM	Spatial Planning, Environment and Land Use Management Committee



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CHAPTER 1

BACKGROUND AND INTRODUCTION

1.1 BACKGROUND OF THE STUDY

The 1996 Constitution¹ has enhanced and entrenched local government as a sphere of government, alongside the national and provincial spheres, which are all distinctive but inter-dependent and interrelated.² With the new recognition, local governments are now vested with the mandate of development of the local communities by providing services that improve the social and economic conditions of the people. This mandate of local government is moulded in the concept of developmental local government. Developmental local government has been defined as local government committed to working with citizens and groups within the community to find sustainable ways to meet their social, economic and material needs and improve the quality of their lives.³ This mandate finds its origin in the Constitution where local governments have been established with the objectives of providing democratic and accountable government to local communities and to ensure the provision of services to communities in a sustainable manner.⁴ These are, among others, the constitutional framework objectives within which local governments must and has been operating since the 1996 Constitution. It sets the standard of measurement of the success of the new local government dispensation.

1.2 PROBLEM STATEMENT

Fulfillment of the mandate vested in the local government entails a number of performance indicators. The better performance of municipalities requires sound governance and

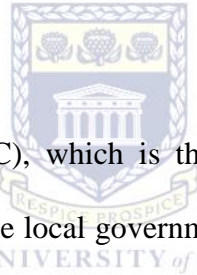
¹ Constitution of the Republic of South Africa Act No 108 of 1996.

² S 40 (1) Constitution 1996.

³ White Paper on Local Government section 1998 B 1.

⁴ S 152 Constitution.

administration. The local government sphere has been facing problems in governance. The Local Government Turn Around Strategy acknowledges the issue of governance as one of the problems facing local governments. Governance includes areas of political leadership, institutional organisation, capacity and skills, oversight and regulation, monitoring and reporting.⁵ The State of Local Government in South Africa: Overview Report⁶ also indicates the issue of governance as one of the challenges facing local governments. The report's assessment shows that the governance problem is emanating from a number of factors including; (a) tension between the political and administrative interface, (b) poor ability of many councillors to deal with the demands of the local governments, (c) insufficient separation of powers between political parties and municipal councils, (e) lack of clear separation between executive and legislative functions, and (d) inadequate accountability measures.⁷



The African National Congress (ANC), which is the ruling party, also acknowledged the prevalence of the above problems in the local government governance system. The assertion is that the lack of separation of powers is affecting lines of accountability.⁸ The issues of separation of executive and legislative powers at local level and those of accountability, checks and balances, and oversight have been debated at various levels. The argument has been that the conflation of executive and legislative functions in the council as provided by section 151(2) of the Constitution leads to the lack of clarity on the roles of office bearers as well as lack of oversight. Amendment of section 151(2) of the Constitution to create a

⁵ Department of Co-operative Governance and Traditional Affairs *Local Government Turn Around Strategy* 2009 18.

⁶ Department of Co-operative Governance and Traditional Affairs *State of Local Government in South Africa: Overview Report* 2009.

⁷ CoGTA *State of Local Government in South Africa: Overview Report* 2009 10.

⁸ African National Congress *Legislative and Governance Sub-committee Provincial and local Government Review Discussion paper* 2010 16.

separation of powers at local level is suggested as a solution.⁹ In the 2012 Legislative and Governance Policy document the ANC agreed to the constitutional separation of powers as a solution to the above problem.¹⁰ The other viewpoint, however, has been that the problems can be dealt with without any constitutional amendment.¹¹ The proponents of the latter view recommend the use of mechanisms provided by legislation as a solution to the problems of lack of accountability and oversight, and the lack of checks and balances. Questions still remain as to what are these mechanisms and how can they be used for better oversight and delimitation of executive and legislative functions. The background, coupled with the latter suggestion and the question raised, require a systematic assessment of the practical context.

1.3 RESEARCH QUESTION

The governance problem in local governments is linked to poor accountability and oversight. The debate on the solution to this problem has concentrated on the constitutional conflation of power at local level. The proponents of the idea to amend section 151(2) of the Constitution to provide for separation of powers overlook the fact that legislation has provided mechanisms that allow internal separation of powers. On the other hand, the proponents of the idea to maintain the constitutional provision and use legislative mechanisms have not made a proper study of the practical use of those mechanisms. Some metropolitan municipalities have made use of the mechanism to create some form of separation of powers in their governance system. It is for this reason that this study aims to investigate and analyse how the selected metropolitan municipalities have utilised the legislative mechanisms to foster greater oversight and separation of powers within their structures. The study answers the following questions; what mechanisms have been

⁹ De Visser and Akintan *Institutional Tension Between Municipal Chairperson and Executives: Speaking of Mayor Conflict* 2009 23.

¹⁰ African National Congress *Legislative and Governance Policy Discussion Document* 2012 18.

¹¹ De Visser J 'The Political Administrative Interface in South African Municipalities: Assessing the Quality of Local Democracies' In *Commonwealth Journal of Local Governance* 2010 101.

employed? How they have been used? What is the state of oversight structures and delimitation of powers? What are the best practices in the systems of governance?

The study proceeds with the argument that a better and purposeful utilisation of the available mechanisms within the current constitutional setup of local government, can lead to practical separation of executive and legislative powers as well as better oversight.

Amongst a wide range of mechanisms, the focus of this study is on terms of reference and delegation systems as required by section 53 and 59 of the Systems Act,¹² respectively. In that regard the study will examine how the selected metropolitan municipalities have allocated powers through the terms of reference and systems of delegation to the offices of the speaker, the chief-whip, the executive mayor and the office of the municipal manager. The other mechanisms that this study will focus on are section 79 committees and the reporting system under the Municipal Finance Management Act (MFMA).¹³ In that regard the standard structures and powers of the committees will be examined. With regard to the MFMA reporting system, the study will examine the practice in implementation of the mid-year, annual reporting and oversight reporting. In examining these mechanisms, regard will be placed on their relation to oversight and separation of powers.

1.4 SIGNIFICANCE OF THE STUDY

The study is important in that it fills the knowledge gap that has been left in the discussion of the constitutional conflation of executive and legislative powers, its consequences and how to deal with it without amending the Constitution. The study will draw lessons from the practice in the selected metropolitan municipalities on how best the legislative mechanisms can be utilised to separate executive and legislative powers and create greater oversight and accountability at local government level. These best practices can be replicated in other

¹² Local Government: Municipal Systems Act, No 32 of 2000.

¹³ Ss 71, 72, 121 and 129 Local Government: Municipal Finance Management Act No 56 of 2003.

municipalities in an effort to improve oversight and accountability for better municipal governance. Apart from filling the information gap, the study will inform policy makers of the practical ways of managing the combined executive and legislative powers at local government level for better municipal governance and administration. The study is significant in that its outcome will provide direction on improving oversight and contribute to fostering good governance and better service delivery in the long run.

1.5 METHODOLOGY

The study was carried out using a desktop research methodology. Legislation, case law, research papers, journal articles, reports, circulars, and manuals were consulted especially in examining the mechanisms in 1.3 above. The written terms of reference and documents spelling out delegation systems as required by the Systems Act¹⁴ were used in examining how purposefully they have been employed for oversight and separation of powers. Mid-year reports, oversight reports, annual reports and related documents of the selected metropolitan municipalities as required by the Municipal Finance Management Act were a significant source of information on the reporting system in relation to oversight.

The study was carried out in the selected metropolitan municipalities of Cape Town, Johannesburg and Ekurhuleni. These metropolitan municipalities have been selected based on the fact that they have put in place systems delimiting executive and legislative powers of the council.

1.6 CHAPTER OUTLINE

The paper proceeds, in the next chapter, by examining the concepts of separation of powers and oversight, their relationships and the legal framework in the South African constitutional system. The chapter further considers the problems considered as resulting from the current

¹⁴ Ss 53 and 59 MFMA.

constitutional set up in respect of executive and legislative powers at municipal level and discusses the different viewpoints.

The third chapter considers in detail the legislative mechanisms and structures; i.e. terms of reference, delegation, section 79 committees and reporting mechanisms, as tools of oversight and separation of powers. Chapter four considers how the three metropolitan municipalities under review have made use of the above mentioned mechanisms and structures to ensure segregation or separation of powers and functions and to facilitate oversight. Chapter five presents findings, the best practices and makes recommendations in relation to separation of powers and enhancing oversight.



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CHAPTER 2

SEPARATION OF POWERS, OVERSIGHT AND THE LEGAL FRAMEWORK

2.1 INTRODUCTION

The study concerns the legislative mechanisms that may be used to provide a separation of powers and enhance oversight in local government. It is undertaken in the context of South African law and practice in metropolitan municipalities and necessitated by a number of governance problems that are attributed to the conflation of executive and legislative powers in the municipal council. In that regard, it is necessary that the study begin with an examination of the theoretical aspect of the concepts of oversight and separation of powers.

Further, this chapter analyses the relationship between oversight and separation of powers and the relationship between oversight and accountability. This is followed by a discussion of the constitutional and legislative framework of separation of powers and oversight at local government level. The challenges resulting from the functional arrangement in the local governance system cited by certain interest groups and scholars are briefly outlined. The chapter concludes with a brief statement on the divergent options on how to deal with the governance problems resulting from the conflation of powers at local level.

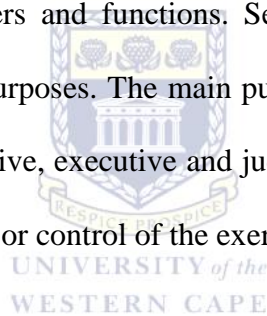
2.2 THE CONCEPTS OF SEPARATION OF POWERS AND OVERSIGHT

2.2.1 Understanding separation of powers

Separation of powers is a jurisprudential doctrine or principle that requires a division and delimitation of powers and functions of the branches of government classified as executive, legislative and judicial in a sense that each of the three branches of government is responsible for a single function. The doctrine was conceived on the need to protect the liberty of individuals and is an antithesis of tyrannical rule. Separation of powers “prevents the accumulation of all powers, legislative, executive and judicial, in the same hands, whether of

one, a few men or many, and whether hereditary or elected".¹⁵ The application of the doctrine ensures independence of the branches of government, facilitates an expedient division of labour, creates more seats or avenues of power and develops areas of expertise in the respective branches.¹⁶

The principle of separation of powers is not only important in that it creates efficiency, but it is also necessary in ensuring that there are proper checks and balances of the exercise of power as well as better oversight relationships.¹⁷ The principle of separation of powers divides powers of government among different branches of government, whereas the doctrine of checks and balances prevents each of the branches from usurping power of another branch.¹⁸ The existence of the system of checks and balances follows the existence of a separation or delimitation of powers and functions. Separation of powers, therefore, is a principle that serves a number of purposes. The main purpose that it serves is to prevent the accumulation of all powers; legislative, executive and judicial in one body or person so as to allow a proper and reciprocal check or control of the exercise of the powers of government.



2.2.2 Understanding oversight

In the ordinary English meaning, oversight in so far as it is relevant to the concept under discussion is derived from the word oversee. To oversee is to watch somebody or something and make sure that a job or activity is done correctly.¹⁹ In the context of this discussion, oversight is considered in the scenario of a relationship between the legislative organs to oversee the executive and administrative organs, commonly referred to as legislative

¹⁵ O'Regan K 'Checks and Balances Reflections on the Development of the Doctrine of Separation of Powers in the South African Constitution' in *PER Potchefstroom Electronic Law Journal* 18(1) 2005 4, quoting Thomas Madison in the Federalist Papers.

¹⁶ De Visser and Akintan *Institutional Tension Between Municipal Chairpersons and Executives-Speaking of Mayor Conflicts* 2008 11.

¹⁷ De Visser and Akintan 2008 11, and O'Regan K 2005 4.

¹⁸ *Re: Certification of the Constitution of the Republic of South Africa*, 1996 1996 (10) BCLR 1253 (CC), 1996 (4) SA 744(CC) at Para 108.

¹⁹ Hornby AS *Oxford Advanced Learners Dictionary of Current English* 2010.

oversight. Legislative oversight connotes the legislative supervision or watchfulness of the authority which is considered delegated to the executive branch and entities.²⁰ According to Lemos, it connotes the notion of monitoring, supervising and controlling.²¹ In another use of phraseology, the Ohio Legislative Commission defines legislative oversight as legislative review and evaluation of activities of the executive branch of government.²² In essence oversight refers to the watchfulness, supervision, control, monitoring, review and evaluation of the exercise of power of the executive and executive organs by the legislature. In this study, oversight refers to such legislative oversight in municipal governance.

A useful distinction of the types of oversight can be made, depending on the stage of the decision making process. These types are classified as *ex ante* oversight, concurrent oversight and *ex post* oversight.²³ *Ex ante* oversight entails providing consent to the proposals of the executive by way of approving or delegating accordingly. This is a way of scrutiny of the subject before a decision is taken by the overseen body or person.²⁴ Concurrent oversight is the legislative oversight that focuses on the behaviour of the executive during the execution stage of the policies, laws, programmes or any other delegation.²⁵ *Ex post* oversight is oversight that occurs at the end of the implementation phase and examines performance against the goals of enacted policy or approved programmes.²⁶

Oversight is important as it ensures that the executive complies with legislative intent, improves efficiency and effectiveness, evaluates performance, prevents executive encroachment on powers, and ensures investigation of alleged instances of poor

²⁰ Oleszek WJ *Congressional Oversight: An overview* Congressional Research Service Report for Congress 2010 4.

²¹ Lemos LB *Legislative Oversight of the Executive Branch in Six Democracies in Latin America* 2010 7.

²² Ohio Legislative Service Commission *A guide Book for Ohio Legislators* 2010 73.

²³ Khaile ST *Legal and Institutional Measures: Key Requirements for Effective municipal Budget Oversight* (LLM Thesis, University of the Western Cape) 2011 14.

²⁴ Khaile ST Thesis 14.

²⁵ Khaile ST Thesis 15.

²⁶ Khaile ST Thesis 16.

administration, abuse, waste, dishonesty and fraud.²⁷ Oversight ensures that the executive arm of government is accountable for the exercise of their powers and performance of their functions.

2.2.3 Relationship between separation of powers and oversight

There is a relationship between separation of powers and oversight. This relationship exists in the sense that oversight, as defined above, requires an existing division or delimitation of powers classified as executive and legislative. That division or delimitation of powers is characteristically the prescription of the doctrine of separation of powers. It can, therefore, be rightly said that for legislative oversight to be effectively exercised, there must be some application of the doctrine of separation of powers.

Separation of powers is also related to oversight if observed from the perspective of accountability. Adhering to the principle of separation of powers has the potential of enhancing accountability. According to Justice O'Regan, separation of powers enhances the vision of democracy which is founded on the values of accountability, responsiveness and openness.²⁸ Accountability is understood as a social relationship in which an actor feels an obligation to explain and to justify his or her conduct to some significant other.²⁹ The significant other to whom the account or explanation is given exercises watchfulness and oversees the accountor, thereby creating an oversight relationship. According to Bentham, the more strictly we are watched, the better we behave.³⁰ This is the rationale behind emphasis on oversight and accountability. There is a relationship between accountability and oversight; the more an institution is overseen, the more accountable it becomes. The application of the

²⁷ Kaiser, Oleszeck and Taleman *Congressional Oversight Manual* 2010 2-3.

²⁸ O'Regan K 2005 5.

²⁹ Bovens M 'Public Accountability' in *The Oxford Handbook of public Accountability* 2005 184.

³⁰ Lindberg SI 'Accountability: The Core Concept and its Sub-types' in *Africa Power and Politics Working Paper No 1* 1999 7.

doctrine of separation of powers, therefore, ensures an environment that facilitates oversight and accountability

2.3 CONSTITUTIONAL AND LEGISLATIVE FRAMEWORK

2.3.1 Separation of powers in the Constitution and legislation

The Constitution has not expressly used the term separation of powers, but has made provisions which put into effect principles of the doctrine. The Constitutional Court, while determining whether the 1996 Constitution complied with the constitutional principles in providing for separation of powers, held that separation of powers was adequately provided.³¹

The legislative, executive and judicial functions have been vested in different branches or organs, at least at national and provincial level. At national level legislative authority is vested in Parliament,³² executive authority is vested in the President who is supported by the cabinet,³³ and as to judicial authority, it is vested in the judiciary that adjudicate in the whole of South Africa without regard to spheres of government.³⁴ At provincial level legislative power is vested in the provincial legislature³⁵ and executive authority vested in the premier who is supported by the provincial executive council.³⁶ There is, in this case, a clear division of powers between the three branches of government at the national and provincial level.

At local government level, however, the Constitution has vested both legislative and executive powers in the council.³⁷ There is no separation of powers at municipal level, a position confirmed by the Constitutional Court in *Masondo* case,³⁸ as will be noted below.

Legislation, in line with the constitutional provision, has also provided that executive and

³¹ *Re: Certification of the Constitution of the Republic of South Africa* 1996 111.

³² S 43(a) Constitution.

³³ S 83 Constitution.

³⁴ S 165(1) and s 166 Constitution do not subject the courts hierarchy to specific sphere of government as is the case with the legislature and executive.

³⁵ S 43(b) Constitution.

³⁶ S 125(1) Constitution.

³⁷ S 151(2) Constitution.

³⁸ *Democratic Alliance v Masondo* 2003 (2) BCLR 128 (CC) Para 60.

legislative authority of a municipality rest in the council of the municipality, subject to delegation.³⁹

Despite generally vesting both legislative and executive authority in the council, legislation has to an extent the executive functions from the legislative functions. The allocation of functions of office bearers is done in a way that the executive office bearers perform and are responsible for specific executive functions. For instance, while providing that both executive and legislative authority are vested in the council, legislation has equally provided that the executive authority of the council may be exercised through the executive committee or the executive mayor, depending on whether it has a collective executive system or executive mayoral system.⁴⁰ In such a scenario, legislative functions are performed by the council whereas executive functions are performed by the executive committee or executive mayor.⁴¹

Besides the segregation of executive and legislative functions and structures, legislation has also provided mechanisms which if properly used, contribute to the separation of powers at local government level. These include the terms of reference which designate the roles and responsibilities of each political structure or office bearer and the systems of delegation through which the council may transfer part of its powers to political structures and positions.⁴² The use of such mechanisms to create some form of separation of powers and enhance oversight is the main subject of this study and will be discussed in the chapters to follow. At this stage what is clear is that the Constitution and legislation, while providing for oversight and separation of powers at national and provincial level, have not done so with regard to local government.

³⁹ S 11(1) Local Government: Municipal Systems Act, No 32 of 2000 (Systems Act).

⁴⁰ S 7(a) and (b) Structures Act.

⁴¹ Such segregation, however, does not exist in a plenary type of municipalities as executive authority is exercised by the council itself.

⁴² S 59(1) Systems Act.

2.3.2 Justification for conflation of powers at municipal level

The absence of separation of powers in the legal framework may be justified. Justice O'Regan in her dissenting judgment in the case of *DA v Masondo* stated that the absence of separation of powers at municipal level corresponds with the nature of the functions of local government. She stated that the functions of local government do not involve high affairs of the state such as defence, foreign affairs, justice and security, but merely matters dealing with delivery of services and facilities to local communities such as power, water, waste management, parks and recreation, and decisions on development and planning.⁴³ This justification can be criticised on two grounds. First, the municipalities have enormous authority and do handle complex issues, especially with the growth of metropolitan municipalities.⁴⁴ They are also involved in some matters of security in the local government areas as well as foreign municipal relations. Secondly, the original purpose for which the doctrine of separation of powers was meant to serve, i.e., to prevent tyranny and abuse of power, should not be the sole consideration. In modern times, separation of powers has been a mechanism for enhancing government efficiency. In the words of Justice O'Regan herself, in some systems such as the South African one, it enhances democracy based on the values of accountability, responsiveness and openness.⁴⁵ These factors justify having a separation of powers at municipal level other than conflation of powers.

The other consideration could have been the need to accommodate all types or systems of municipalities which are different in form and size. In a plenary municipal system, both executive and legislative authority of the council is exercised through the council itself.⁴⁶

⁴³ *DA v Masondo* Para 60.

⁴⁴ De Visser and Akintan 2008 13.

⁴⁵ O'Regan K'Checks and Balances Reflections on the Development of the Doctrine of Separation of Powers in the South African Constitution' in *PER Potchefstroom Electronic Law Journal* 8(1) 2005 5.

⁴⁶ S 7(c) Structures Act.

Prescribing a separation of powers in the Constitution for municipalities would eclipse this form of municipal system.

2.3.3 Perceived problems resulting from the conflation of powers at municipal level

What, then, are the consequences of this conflation of executive and legislative powers at local level? De Visser has stated three challenges emanating from this constitutional set up.⁴⁷ First, he observes that the conflation of powers at local government level complicates or creates confusion in relation to the office of the speaker of the council. Although the speaker would properly be considered to be the head of the legislative functionality of the council, the council also makes executive and administrative decisions presided by the speaker. In practice, he or she is not really divorced from the municipal executive and municipal decision making. The Speaker's office is reliant on the executive and administration for its budget which makes it difficult for the office to exercise its functions independently. Further, the conflation sets a scene with likelihood of tension between the office of the speaker and that of the mayor.⁴⁸ This tense relationship does not provide an environment conducive for cordial and efficient administration.

De Visser states that there is no clarity as to the office in charge of municipal administration.⁴⁹ Is it the speaker or the mayor? Thirdly, it is stated that the conflation makes room for municipalities leaves a chance for adoption of committees. In aligning with the conflation of powers provided by the Constitution, legislation has not boldly stipulated which committees are for the executive or for the council. Legislation has merely provided different types of committees with discretion of the municipalities to designate the powers and functions. He observes that most of the municipalities, as a result, have adopted section 80

⁴⁷ De Visser J 'The Political-Administrative Interface in South African Municipalities Assessing the Quality of Local Democracies' in *Commonwealth Journal of Local Governance* 2010 86-101 91.

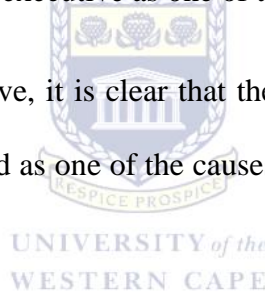
⁴⁸ De Visser and Akintan 2008 15.

⁴⁹ De Visser J 2010 94.

committees which are merely portfolio committees assisting the executive mayor and have not made use of section 79 committees which could have been providing independent oversight on the executive and administration.

The African National Congress (ANC), through its National Executive Sub-committee also noted that the absence of separation of powers at municipal level results in a blurred line of accountability of the mayors and mayoral committees to the municipal council,⁵⁰ as the mayor and mayoral committee are part and parcel of the council. The accountability and oversight relationships at local government level are not clear and straight forward and create a challenge in governance. The National State of Local Government Report 2009, as noted earlier, indicates that municipal governance is in distress and cited the lack of separation of powers between the council and the executive as one of the causes.⁵¹

From the discussion and views above, it is clear that the absence of separation of powers at local government level is being cited as one of the causes of governance problems existing in the sphere.



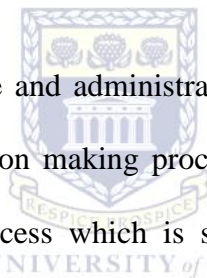
2.3.4 Defining and delineating the powers and functions at municipal level

Relevant to the issue of separation of powers at local government level is the question of what constitutes legislative powers and functions, on the one hand and executive and administrative functions, on the other hand. Neither the Constitution nor legislation has clearly explained what are executive powers and functions or what are legislative powers and functions.

⁵⁰ African National Congress Legislative and Governance NEC Sub-committee *Provincial and Local Government Review Discussion Paper* 2010 17.

⁵¹ Department of Cooperative Governance and Traditional Affairs (CoGTA) *State of Local Government: Overview Report* 2009 10.

The distinction of the executive and legislative powers or function was part of the Constitutional Court decision in *Fedsure*.⁵² Ten corporate ratepayers objected to a substantial increase in their property rates. They challenged the lawfulness of certain resolutions adopted by the Greater Johannesburg Transitional Metropolitan Council (TMC) in relation to their 1996/97 budgets which had given rise to this increase. In the course of making the decision, the court had to decide whether the resolution making process was an administrative action to be reviewed by the court under section 24 of the interim Constitution.⁵³ The court held that the resolution raising the levy, which was being challenged, formed an integral part of adopting a budget and constitutes exercise of taxing and spending powers. Such powers are classified as legislative as opposed to administrative and not reviewable under section 24 of the interim Constitution.⁵⁴



The Court also distinguish legislative and administrative action based on the nature of the decision making body and the decision making process. It stated that legislation made by functionaries is made through a process which is substantially administrative, while the process of law making by deliberative bodies is essentially legislative.⁵⁵ This, however, does not mean that all decisions of a deliberative body like a municipal council are legislative. In the judgment of the Supreme Court of Appeal,⁵⁶ for instance, the power to appoint staff was held to be part of the executive authority of the council provided by the Constitution which cannot be divested either by delegation or legislation.⁵⁷ This means that even though the power to appoint staff is administrative and is provided by section 55(1) of the Systems Act,

⁵² *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others* (CCT7/98) [1998] ZACC 17; 1999 (1) SA 374; 1998 (12) BCLR 1458.

⁵³ S 24 Constitution of the Republic of South Africa Act 200 of 1993 provides for a right to lawful and procedurally fair administrative action justifiable in relation to reasons given.

⁵⁴ *Fedsure* case Para 45.

⁵⁵ *Fedsure* case Para 26.

⁵⁶ *Manana v King Sabata Dalindyebo Municipality* (345/09)[2010]ZASCA 144.

⁵⁷ *Manana* case Para 13-14.

it is part of the powers of the council delegated to the administration and may still be exercised by the council itself.

In the *Mnquma* case,⁵⁸ the court attempted to explain what constitutes executive functions as it was considering the meaning of executive obligations in the context of section 139(1) of the Constitution. Executive functions were said to be the residue of functions of government after legislative and judicial functions have been taken away. The Court was of the view that the word executive in local government, as it relates to obligations, must be given the same ordinary meaning as at national and provincial level. These executive functions include the power and authority to implement and administer legislation in relation to local government powers; the provision of necessary services and administration; the development of policy in relation thereto, and the initiation, implementation and administration of by-laws within its functions.⁵⁹ This is the ambit of executive powers and functions at local government level.

2.3.5 Oversight in the Constitution and legislation

At national level the National Assembly is responsible for, among other things, scrutinising and overseeing executive action.⁶⁰ In another provision, the Constitution unequivocally obliges the National Assembly to provide mechanisms that will ensure that all executive organs at national level are accountable to it, and that it maintains oversight over the exercise of national executive authority.⁶¹ In the oversight and accountability relationship between Parliament and the executive, members of the Cabinet are required to provide to Parliament full and regular reports concerning matters under their control.⁶² Legislative oversight over executive organs at national level has, therefore, been clearly provided for in the Constitution.

⁵⁸ *Mnquma Local Municipality and Another v Premier of the Eastern Cape and Others* (231/2009) [2009] ZAECBHC 14 (5 August 2009)

⁵⁹ *Mnquma* case Para 61.

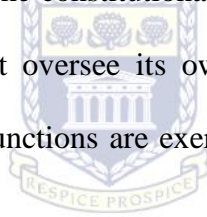
⁶⁰ S 42(3) Constitution.

⁶¹ S 55(2) Constitution.

⁶² S 92 (3) (b) Constitution.

At provincial level the provincial legislature is instructed to have mechanism to ensure that all executive organs in the province are accountable to it and that it must maintain oversight of the exercise of executive authority in the province.⁶³ Further, members of the executive council are required to provide to the legislature full and regular reports concerning matters under their control.⁶⁴ In this case as well, oversight has been clearly provided for by the Constitution.

At local government level the Constitution does not expressly provide for legislative oversight over the executive. The absence of an express provision for legislative oversight flows from the fact that both the executive and legislative powers are vested in the council.⁶⁵ Legislation imports from the Constitution the vesting of both executive and legislative authority in the council.⁶⁶ The constitutional set up creates a drawback in terms of oversight because the council cannot oversee its own exercise of executive authority. It makes a difference if the executive functions are exercised by another structure over which the council will exercise oversight.



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In the case of executive mayor or executive committee municipal systems, however, the executive authority of the council may be exercised through the executive mayor or the executive committee.⁶⁷ In such scenarios, there is a separate body or organ to exercise executive functions on behalf of the council. This then brings in the possibility of the council overseeing the exercise of such executive authority. Further to that, legislation has provided mechanisms that may be used to separate the executive from the council, i.e., terms of reference and delegations. The same mechanisms may be used to facilitate oversight at local government level by allocating proper oversight functions to legislative structures.

⁶³ S 114(2) Constitution.

⁶⁴ S 133(3) (b) Constitution.

⁶⁵ S 151(2) Constitution.

⁶⁶ S 11(1) Systems Act.

⁶⁷ S 7(a) and (b) Structures Act.

Additionally, some legislative mechanisms, such as annual and mid-year reporting, budget processes and performance assessments, ensure that the council exercises oversight over the executive mayor or executive committee.

Thus, despite the absence of an express provision in the Constitution and legislation for legislative oversight in municipalities, there are provisions and mechanisms that facilitate the council oversight over the executive mayor or executive committee.

2.4 THE DEBATE ON SEPERATION OF POWERS AND OVERSIGHT

Generally, academics and policy makers do agree that the conflation of legislative and executive powers in the same council at local government level creates a challenge which has a negative impact on governance. There is, however, a difference of options on how to deal with the problems attributed to the conflation of powers at municipal level.

De Visser and Akintan in discussing the tension that exist between the office of the speaker and that of the mayor intimated that the amendment of section 151(2) of the Constitution to provide for a separation of powers would be one of the options in dealing with the tension between the two offices.⁶⁸ This, according to them, would entail a reworking of related legislation that deals with political structures at local level. They indicate, however, that this option would bring significant changes to the local government system. They argue that a prior nuanced study of what could entail in practice should be done as a viable test before adopting the option.⁶⁹ This, nevertheless, has been a view of many other people and organisations in policy discussion forums, including the ANC. The ANC, however, has fallen short of recommending amendment of section 151(2) of the Constitution. It has merely

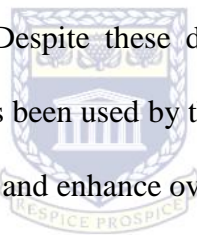
⁶⁸ De Visser and Akintan 2008 23.

⁶⁹ De Visser and Akintan 2008 24-25.

recommended that there should be a greater separation of executive and legislative arms of municipalities.⁷⁰ It is not clear whether the ANC envisages a constitutional amendment

De Visser on the other hand, while accepting that the conflation of powers creates a challenge, argues that the focus should not be on the debate on conflation of powers but on other ways of improving governance and resolving the resulting problems within the current legal framework.⁷¹ The municipalities, he states, can make use of legislative mechanisms which already provide for a degree of separation of the functions at local level.⁷² These mechanisms can be used to effectuate separation of powers at local government level without constitutional amendment

The discourse above shows views on how to deal with the consequent problems of the conflation of powers at local level. Despite these diverse options, this study focuses on understanding how the latter option has been used by the selected metropolitan municipalities to provide for the separation of powers and enhance oversight.



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2.5 CONCLUSION

This chapter has noted that oversight is an important function for effective governance. It is one of the attributes of good governance as it ensures the accountability of those who exercise power. It has also been noted that the doctrine of separation of powers, when applied in a governance system, creates an environment conducive to oversight and accountability as it delineates powers and functions of different structures of governance. There is an inherent relationship between separation of powers and oversight.

In the South African context, it has been observed that while the Constitution has provided for legislative oversight at national and provincial level, it has not provided for legislative

⁷⁰ ANC Recommendations from the 4th National Policy Conference June 2012 30.

⁷¹ De Visser 2010 93.

⁷² De Visser 2010 90.

oversight at local government level. This causes governance challenges in the local government sphere.

It has been noted that there are two possible options in dealing with the problems of governance attributed to the conflation of powers. These are either to amend the Constitution and provide for separation of powers, or to retain the current legal set up and work with it. The latter option proposes the use of available legislative mechanisms to provide for separation of powers in practice. The mechanisms that may be used will be discussed in detail in the next chapter.



CHAPTER 3

LEGISLATIVE MECHANISMS AND STRUCTURES FOR SEPARATION OF POWERS AND OVERSIGHT

3.1 INTRODUCTION

It has been noted that one proposition emphasises on the use of mechanisms made available by legislation to provide for separation of powers and functions, and to facilitate meaningful oversight at municipal level. The utilisation of these mechanisms and structures is the subject of this study. There are a number of such mechanisms provided by legislation. They include the terms of reference and the systems of delegation as required by the Systems Act,⁷³ use of annual reports, use of service delivery and budget implementation plan (SDBIP), budget statement, mid-year budget performance reviews, performance agreements, use of section 79 committees and oversight committees.

This chapter examines a selection of these mechanisms, particularly those that are considered significant in creating separation of powers and better oversight relationships at municipal level. The scope of the chapter is limited to analysing the use of terms of reference and systems of delegation, section 79 committees, and the annual and mid-year budget assessment reporting. The analysis proceeds in that order below.

3.2 TERMS OF REFERENCE AND DELEGATION

3.2.1 Terms of reference

The Systems Act instructs municipalities to allocate roles and responsibilities to political structures, political office bearers and the municipal manager through the use of terms of reference.⁷⁴ This is one of the means that municipalities may use to segregate powers,

⁷³ S 53 and s 59, respectively, Systems Act.

⁷⁴ S 53(2) (a) Systems Act.

functions and structures in their governance models and to enhance oversight through proper oversight relationships.

A 'political structure' in this case has been defined as including the council of the municipality, or any committee or other collective structure of a municipality elected, designed or appointed in terms of specific provisions of the Municipal Structures Act.⁷⁵ A political office bearer has been defined as including the speaker, executive mayor, deputy executive mayor, mayor, deputy mayor or member of the executive committee as referred to in the Municipal Structures Act.⁷⁶

Through this process of designating roles and responsibilities, municipalities may allocate those roles and responsibilities in a manner that segregates executive powers, functions and structures from legislative powers, functions and structures. It is through this process that better oversight relationships and oversight roles can be created.

The Systems Act requires that these respective roles and responsibilities be drawn in precise terms of reference and must be acknowledged and given effect to in the rules, procedures, instructions, policy statements and other written instruments of the municipality.⁷⁷ In essence, municipalities have been given the power and discretion to design roles and responsibilities of political structures and political office bearers in addition to the powers and functions already allocated by the Constitution or legislation to these office bearers and structures. The discretion is significant as it gives the municipalities an opportunity to design the governance structures in a manner that facilitates oversight.

The Systems Act has also provided which matters are to be taken into account when allocating the roles and responsibilities or designing the structures. First, it is required that the

⁷⁵ S 1 Systems Act.

⁷⁶ S 1 Systems Act.

⁷⁷ S 53(2) (b) Systems Act.

allocation of roles and responsibilities must determine the relationship among the political structures, the political office bearers and the manner in which they are to interact.⁷⁸ Secondly, the allocation of roles and responsibilities must determine appropriate lines of accountability and reporting.⁷⁹ Thirdly, the designation of roles and responsibilities must also determine mechanisms, processes and procedures for minimising cross-referrals and unnecessary overlapping of responsibilities between the structure and office bearers, including the mechanisms of resolving disputes and for interaction.⁸⁰ By this mechanism, municipalities can allocate the roles and responsibilities in a manner that some office bearers and structure exercise oversight functions on other office bearers and structures.

3.2.2 Systems of delegation

The Constitution⁸¹ and legislation have given the council all the executive and legislative authority of a municipality, including the power to make all decisions, subject only to what has been delegated under section 59 of the Systems Act.⁸² The Systems Act prescribes that a municipal council must develop a system of delegation that will maximise administrative and operational efficiency and provide for adequate checks and balances.⁸³ It is important to note that the delegation systems are aimed at maximising administrative and operational efficiency, and aimed at providing for checks and balances. As was noted in the previous chapter,⁸⁴ the system of checks and balances presupposes a division or segregation of powers and functions and makes sure that the relevant structures or office bearers do not encroach on the authority or powers or functions of another or that they do not overstep their limits. From this provision, therefore, it may be concluded that the law envisages that there will be a

⁷⁸ S 53(5) (a) Systems Act.

⁷⁹ S 53(5) (b) Systems Act.

⁸⁰ S 53(5) Systems Act.

⁸¹ Steytler and De Visser *Local Government Law of South Africa* 2011 3.3.

⁸² S 11(1) Systems Act.

⁸³ S 59(1) Systems Act.

⁸⁴ See Para 2.2.1 above.

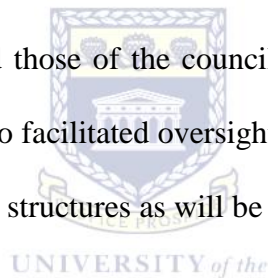
division of functions. These systems of delegation may be used to give executive powers and functions to political structures and political office bearers other than the council. That is a useful mechanism that may be utilised jointly with the terms of reference. In the process, different political office bearers and structures separated or segregated from the council are allowed to exercise the executive powers and functions with some independence.

In defining the concept of oversight, Oleszek defined it as a kind of legislative supervision or watchfulness of authority which is considered delegated to the executive branch entities or officials.⁸⁵ In line with the definition, the use of these delegation systems will entail that some political structures and political office bearers will be designated as executive by means of delegation. In that manner, the council will be able to oversee them and hold them accountable for the exercise of their delegated powers as well as performance of their functions. This aligns with the general trend in representative parliamentary democracies. According to Stomp, representative parliamentary democracies feature a chain of delegations from voters to those who govern. One such step is the delegation from the legislature to the executive branches.⁸⁶ With proper use of the mechanism of delegation, municipalities can accordingly separate council powers between executive and legislative, thereby creating some oversight and accountability relationships. The difference is that the Constitution has vested legislative powers to Parliament and provincial legislature, separating it from the executive functions, while at local government level there is no such specific legislative function vested in the council separated from the executive functions. This limits the nature of the separation that may be created by the delegation as the delegated powers and functions can still be exercised by the council.

⁸⁵ Oleszek WJ *Congressional Oversight: An Overview* 2010 4.

⁸⁶ Stomp K *Delegation and Accountability in Parliamentary Democracies* 2000 7.

The Systems Act ensures accountability by office bearers or structures that exercised delegated powers and functions by prescribing some measures. First, it requires that the recipients of delegated powers report to the delegating authority at intervals.⁸⁷ Secondly, the delegation may be reviewed by the council whenever it is considered necessary.⁸⁸ Thirdly, the delegation may be withdrawn.⁸⁹ Lastly, matters within the scope of the delegated powers may be referred back to the delegating authority for decision.⁹⁰ This means that the council will still keep a watch over the exercise of powers which are delegated. The use of systems of delegation as provided by legislation is a viable tool for creating a model of separation of powers where better oversight relationships exist. The above factors, however, are drawbacks in relation to independent functioning and separation of the executive from the council. The provisions vest strong oversight powers in the council, but result in joining of functions between those of the executive and those of the council. One of the goals for applying the doctrine of separation, however, is to facilitate oversight. That goal may still be attained with proper use of other mechanisms and structures as will be noted below



3.3 SECTION 79 COMMITTEES AND SECTION 80 COMMITTEE SYSTEMS

There are a variety of committees that a municipality may establish. Such committees include the executive committees,⁹¹ mayoral committees,⁹² ward committees, section 79 and section 80 committees, and any other committees that may be established by a sub-council of a metropolitan municipality.⁹³ This part of the study is concerned with committees established under section 79 of the Structures Act and therefore discusses the same in detail.

⁸⁷ S 63 Systems Act.

⁸⁸ S 65 Systems Act.

⁸⁹ S 64 Systems Act.

⁹⁰ S 61 Systems Act.

⁹¹ S 42 Structures Act.

⁹² S 60(1)(a) Structures Act.

⁹³ S 71 Structures Act.

3.3.1 Section 79 committees

The general authority to establish committees is provided by the Constitution and legislation.⁹⁴ When establishing committees, municipalities are required to take into account the extent of the functions, the need for delegation for efficiency and effectiveness, and the availability of financial and administrative resources.⁹⁵ In terms of section 79 committees, the council appoint members of such committees from amongst the councillors and has power to dissolve the committees.⁹⁶ These committees are very useful as they may be used for oversight over the executive and administration as they do not report to the executive, as will be seen in section 3.3.2 below.⁹⁷ This required purpose can be achieved if the section 79 committees are made to operate in a manner, with necessary modifications, like portfolio committees of Parliament at national level or of provincial legislatures at provincial level. At the national level, the committees have been given oversight powers, including the power to summon any person and to require any person or institution to report to it.⁹⁸

It is strongly recommended that to create oversight relationships and better oversight, municipalities need to make use of section 79 committees as they are not answerable to the executive of the municipality,⁹⁹ as will be seen in contrasting section 79 committees with section 80 committees below. The significance of section 79 committees not answering or reporting to the executive would be best understood if section 79 committees are distinguished from section 80 committees as done below.

⁹⁴ S 160(1) Constitution and s 33 Structures Act, respectively.

⁹⁵ S 33(b) Structures Act.

⁹⁶ S 79(1) Structures Act.

⁹⁷ De Visser J 2010 100.

⁹⁸ S 56 and 69 Constitution.

⁹⁹ De Visser J 2010 100.

3.3.2 Section 80 committees: features and distinction with section 79 committees.

Section 80 committees and section 79 committees are subject to the same requirements under section 79 of the Structures Act. However, they are different to the extent provided in section 80.¹⁰⁰ It could be said that section 79 sets the general terms of committees and thus provides a *genus*, whereas section 80 provides for a special kind of section 79 committees and thereby provide a *species* of section 79 committees. This is clear from the use of the phrase “may appoint in terms of section 79” in legislation when referring to the authority of the council to appoint section 80 committees.¹⁰¹ This means they will be established on the general terms under section 79, but the special terms under section 80 will apply.

As was stated earlier, section 80 committees are attached to the executive as the following factors show: First, section 80 committees are established to assist the executive committee or the executive mayor charged with executive authority of the municipality.¹⁰² This is in contrast with the general rationale of establishing section 79 committees, which are appointed, if necessary, for the effective and efficient performance of any of the council’s function or exercise of its powers.¹⁰³ It means that the purpose of section 79 committees have not been specified, whereas section 80 committees are specifically established to assist the executive.

Secondly, the chairpersons of the section 80 committees are appointed by the executive committee or executive mayor from the executive committee or mayoral committee.¹⁰⁴ As noted elsewhere, municipalities may either have (i) a collective executive system where the executive authority is collectively exercised through the executive committee appointed by the council, or (ii) an executive mayoral system where the executive authority of the council

¹⁰⁰ Steytler and De Visser *Local Government Law of South Africa* 2011 3-42.

¹⁰¹ S 80(1) Structures Act.

¹⁰² S 80(1) Structures Act.

¹⁰³ S 79(1) (a) Structures Act.

¹⁰⁴ S 80(2) (a) Structures Act.

is exercised through the executive mayor, or (iii) a plenary system where executive authority is exercised by the council itself.¹⁰⁵

Section 80 committees are only applicable to municipalities with executive committee or executive mayor systems,¹⁰⁶ and the members are appointed from the executive committee or mayoral committee. The chairpersons of section 80 committees are thus responsible for a particular executive portfolio of the municipality. This is in contrast with chairpersons of section 79 committees who are not appointed from the mayoral committee or executive committee.¹⁰⁷

Thirdly, the council may delegate to section 80 committees some powers and duties of the executive committee or executive mayor, which are in essence executive powers and duties.¹⁰⁸ With such an arrangement it cannot be expected that a committee exercising executive functions would exercise oversight functions over the executive of the municipality, especially when the executive is the one that gives it the powers and duties in question. On the other hand, in as far as section 79 committees are concerned, it has not been specifically stated that they may be delegated executive functions. The council may delegate powers to section 79 committees as it deems fit.¹⁰⁹

Fourthly, the decisions of section 80 committees may be varied or revoked by the executive committee or executive mayor, making these committees more sub-servient to the executive organs of the municipality.¹¹⁰ There is no such provision in respect of section 79 committees authorising any review or variation of decision, although section 79 committees are subject to the council's power to review its decisions as the delegating authority. However, such power

¹⁰⁵ S 7(a), (b) and (c) Structures Act.

¹⁰⁶ S 80(1) Structures Act.

¹⁰⁷ S 79(2) (c) Structures Act.

¹⁰⁸ S 80(3) (b) Structures Act.

¹⁰⁹ S 79(2) (b) Structures Act.

¹¹⁰ S 80(2) (d) Structures Act.

of review and variation of section 79 committee decisions may be implied from the council's power to appoint and dissolve the section 79 committees. In which case, the review and variation powers can only be exercised by the council.

Fifth is that section 80 committees are obligated to report to the executive committee or executive mayor in accordance with directions from the executive committee or executive mayor.¹¹¹ This clearly shows that section 80 committees receive directions from the executive. Section 79 committees do not report to the executive, but are answerable to the council as the delegating authority.

The foregoing factors indicate that section 80 committees are more aligned to the executive and they are ill-suited for legislative oversight over the municipal executive.

The use of section 79 committees for better oversight is further recommended considering that the council is responsible for determining the functions and procedure of these committees.¹¹² With such powers, coupled with the authority to allocate powers and function by the use of terms of reference and systems of delegation, municipal councils may give requisite powers to section 79 committees to enable them play a significant role in overseeing municipal executives. Section 79 committees are, therefore, very important tools of oversight over the executive. The possibility of achieving that is, however, very much dependent on the powers allocated to them by each municipality and the manner in which other mechanisms of oversight are employed. Such other mechanisms for oversight are discussed below.

¹¹¹ S 80(4) Structures Act.

¹¹² S 79(2) (a) and (f) Structures Act.

3.4 MFMA REPORTING SYSTEM: ANNUAL REPORTS AND MID-YEAR BUDGET AND PERFORMANCE ASSESSMENT REPORTS

The need to ensure accountability, responsiveness and openness¹¹³ applies to local government sphere of governance as it constitutes a part of the overall government of the Republic.¹¹⁴ There are a number of ways through which openness and accountability can be attained, including through establishing reporting systems that enhance oversight and accountability relationships. The notion of transparency and accountability through reporting mechanisms in the South African context is the subject of a number of legislative instruments, including the MFMA. In the MFMA, the reporting mechanisms include the following;

- (i) monthly budget statements by the accounting officer to the mayor and the relevant provincial treasury;
- (ii) quarterly reports on the implementation of the budget and the financial state of affairs of the municipality by the mayor to the council;
- (iii) mid-year budget and performance assessment reporting by the accounting officer to the mayor, the National Treasury, the relevant provincial treasury and to the council;¹¹⁵
- (iv) reports on failure to adopt or implement budget related and other policies to the provincial treasury by the accounting officer;¹¹⁶
- (v) submission of financial statements after end of financial year to the Auditor General for auditing, a reporting obligation of the accounting officer;¹¹⁷
- (vi) annual reporting to the council by the mayor followed by adoption of the oversight report by the council;¹¹⁸

¹¹³ S 1 Constitution.

¹¹⁴ S 40(1) Constitution.

¹¹⁵ S 72(1) and 54(1) (f) MFMA.

¹¹⁶ S 73 MFMA.

¹¹⁷ S 126(1) (a) MFMA.

- (vii) reporting to the public by the obligation to place information on websites; and
- (viii) the general reporting obligations of the accounting officer to report to the National Treasury, provincial treasury, department of local government in the province or whenever required.¹¹⁹

All these reporting mechanisms ensure some oversight over the municipal executive and the administration. Since this paper deals with legislative oversight and is limited in scope, it only discusses the annual reporting and the mid-year budget and performance assessment reporting under the Municipal Finance Management Act.¹²⁰

3.4.1 Annual Reports as mechanisms for oversight

All municipalities and municipal entities are required to prepare an annual report seven months and six months, respectively, after the end of each financial year.¹²¹ The purpose of the annual reports is to provide a record of the activities of the municipality during the financial year to which they relate, to provide a report of performance against the budget, and to promote accountability to the local community for decisions made during the year.¹²² Apart from promoting accountability to the local community, annual reports also facilitate accountability of the executive and the administration to the council. This is manifest in the fact that the mayor tables the report in the council where it is discussed.¹²³ At that moment the council exercises oversight and can hold the executive and administration to account by questioning their performance and compliance with the Service Delivery and Budget Implementation Plan (SDBIP).¹²⁴

¹¹⁸S 127(2) and 129(1) MFMA.

¹¹⁹S 74(1) of MFMA.

¹²⁰MFMA No 56 of 2003.

¹²¹S 121(1) MFMA.

¹²²S 121(2) MFMA.

¹²³S 127(2) MFMA.

¹²⁴SDBIP outlines the planned services for the year in line with the budget and must be approved by the mayor 28 days after council's approval of the budget.

The oversight character of the annual reporting process is more evident if viewed from the requirement by legislation that the council must adopt an oversight report containing the council's comments on the annual report.¹²⁵ In addition, the oversight purpose of the annual report is manifest in the fact that the municipal manager, who is the head of the municipal administration, is obliged to attend council and council committee meetings where the annual report is discussed in order to respond to questions concerning the report.¹²⁶ In this instance the council is given the platform to exercise what is referred to as *ex post* oversight over the executive.¹²⁷

The annual reporting makes the oversight process possible due to the nature of its particulars. Annual reports of a municipality are required to include the annual financial statements, the Auditor General's report on those financial statements, the annual performance report, the general Auditor General's report, an assessment by the municipal manager of any arrears on taxes and service charges, among other things.¹²⁸ These particulars in the annual report enable the council to make an assessment of the performance of the municipality and of the executive organs during the relevant financial year. The council can make necessary conclusions and, if necessary, take remedial action. Annual reporting is, for the above reasons, a useful tool for the council to utilise in exercising oversight over the executive and administration.

3.4.2 Mid-year budget and performance assessment report as an oversight mechanism

Another mechanism for legislative oversight is the mid-year budget and performance assessment reporting. The municipal manager of a municipality is required to assess the performance of the municipality during the first half of the financial year by the 25th of

¹²⁵ S 129(1) MFMA.

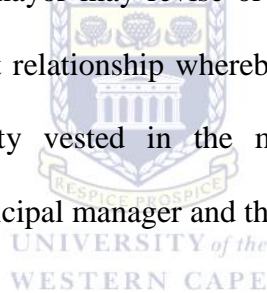
¹²⁶ S 129(2) (a) MFMA.

¹²⁷ Khaile TS *Legal Institutional Measures: Key Requirements for Effective Municipal Budget Oversight* (LLM Thesis 2011) 6. (see also section 2.2.2 above)

¹²⁸ S 121(3) MFMA.

January each year.¹²⁹ There are two oversight relationships that are created by the mid-year budget and performance assessment reporting. The first is between the mayor and the municipal manager, where the municipal manager reports to the mayor. The second is between the mayor and the council, where the mayor reports to the council. In this case the executive oversees the administration whereas the council oversees both the executive and administration.

The municipal manager is instructed to assess the implementation of the budget and the performance of the municipality and to submit the report to the mayor of the municipality as well as to the national and provincial treasuries.¹³⁰ In the process the mayor considers the report and assesses whether the budget, in that half year period, has been implemented in accordance with the SDBIP. The mayor may revise or give appropriate instructions to the accounting officer.¹³¹ The oversight relationship whereby the mayor oversees the municipal manager aligns with the authority vested in the mayor to oversee the exercise of responsibilities assigned to the municipal manager and the chief financial officer.¹³²



The mayor upon receipt of the budget and performance assessment report must submit it to the council by the 31st of January.¹³³ This reporting stage enables the council to exercise its oversight function on the implementation of the budget and the performance of the municipality in general.

Legislation has, thus, provided mechanisms for executive oversight over the administration alongside legislative oversight over the executive and administration. The mid-year budget and performance assessment reporting is one such mechanism that can be utilised to enhance

¹²⁹ S 72(1) (a) MFMA.

¹³⁰ S 72(1) (b) MFMA.

¹³¹ S 54 (1) MFMA.

¹³² S 52 (b) MFMA.

¹³³ S 54(1) (f) MFMA.

oversight in municipalities. If municipalities implement these legislative requirements, better oversight can be achieved.

3.5 CONCLUSION

This chapter has discussed the mechanisms provided by legislation that municipalities may use to create separation of powers and better oversight relationship within their structures. A selection of these mechanisms has been discussed in detail. It has been noted that the terms of reference and the systems of delegation are the mechanisms provided by legislation that can be used to create a limited separation or segregation of functions in municipalities and in the process create an environment where oversight relationships are better managed. It has also been noted that section 79 committees are significant structures for purposes of legislative oversight over the executive and administration. The processes of annual reporting and mid-year budget and performance assessment reporting are additional useful tools that legislation has provided to facilitate meaningful legislative oversight over the executive and administration of the municipalities. The next chapter considers how the three metropolitan municipalities have made use of these mechanisms and structures.

CHAPTER 4

GOVERNANCE AND OVERSIGHT MODELS OF CAPE TOWN, JOHANNESBURG AND EKURHULENI METROPOLITAN MUNICIPALITIES

4.1 INTRODUCTION

As noted in chapter one, the study argues that purposeful use of the available mechanisms provided by legislation may facilitate a measure of separation of powers and functions as well as better oversight. In line with the argument and the objectives of the study, this chapter examines how the metropolitan municipalities of Cape Town, Johannesburg and Ekurhuleni have used these mechanisms to design their governance models with the aim of attaining a separation of powers and better oversight.

The chapter examines the powers, functions and duties allocated to political office bearers and structures in the three metropolitan municipalities through the mechanisms of terms of reference and delegation. In particular, the chapter considers the allocation of those powers, functions and duties to the speaker, the executive mayor, the chief whip, the municipal manager and section 79 committees. Further, the chapter will examine the practice and usage of annual reporting as well as mid-year budget and performance assessment reporting as tools for oversight in the municipalities under study. The main point of consideration is the manner in which the mechanisms and structures provided by legislation have been used to separate executive from legislative functions, and to facilitate sound oversight.

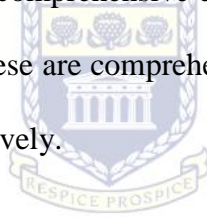
4.2 USE OF TERMS OF REFERENCE AND SYSTEMS OF DELEGATION

This part discusses the approaches used in drawing up terms of reference and systems of delegation, before analysing the use of terms of reference and delegations.

4.2.1 The terms of reference, systems of delegation and the various approaches

There are two approaches the metropolitan municipalities have used in drawing up the terms of reference and delegations to office bearers. The first approach is either combining the terms of reference and system of delegations in the same document or to separate the terms of reference from delegations. The former is referred to as the combined system, whereas the latter is the separated system. This classification is premised on the fact that legislation allows the inclusion of delegation in the same document laying down the terms of reference, although it is not mandatory.¹³⁴ Municipalities may, therefore, opt to combine the two or separate them.

The other approach, the terms of reference or delegations of different office bearers and structures are either laid down in one comprehensive document, or are in separate documents for each office bearer or structure. These are comprehensive and detached system of terms of referencing and/or delegation, respectively.



The City of Cape Town has a system of delegations which also provides the terms of reference for all political office bearers and structures compiled in one document. The current system of delegations was adopted by the council on 1st of June 2011.¹³⁵

The City of Johannesburg has also complied with the requirements of legislation by providing roles and responsibilities to office bearers and structures in the terms of reference which are combined with delegations to the respective office bearers or structures. The City of Johannesburg, however, has not adopted a comprehensive system of terms of referencing and delegation. The terms of reference and delegations for each office bearer and structure are in a separate detached document for each of such office bearer or structure. There is, thus,

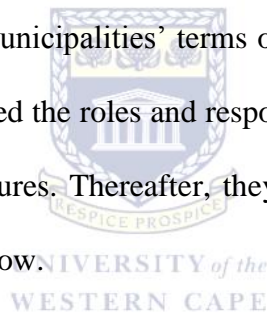
¹³⁴S 53(4) Systems Act.

¹³⁵ City of Cape Town *System of Delegations* 2011 1.

a combined but detached system of terms of referencing and delegation at City of Johannesburg which has been in place since 2008.¹³⁶

Ekurhuleni Metropolitan Municipality, on the other hand, has comprehensive and combined terms of reference and delegations for office bearers and structures. The terms of reference and the delegations are provided together and are compiled in one document for all office bearers and structures. Their comprehensive system of delegations were adopted by the council on 7th September 2011 and updated in March 2012.¹³⁷

Legislation has entrusted some powers and authority to office bearers and structures. For instance, the functions of the speaker and executive mayor have already been outlined by legislation.¹³⁸ The same applies to a number of other office bearers and structures. For that reason, all the three metropolitan municipalities' terms of reference or system of delegations have first acknowledged and included the roles and responsibilities allocated by legislation in respect of office bearers and structures. Thereafter, they allocate and delegate to the office bearers and structure as outlined below.



4.2.2 Allocation of powers and functions to office bearers through terms of reference and delegations

There is a difference in scope in terms of the subjects of the terms of reference and those of the system of delegations. Terms of reference are for political office bearers, political structures and the municipal manager.¹³⁹ On the other hand, delegation may also be made to any councillors, whether holding political office or not, and to staff members, in addition to the political office bearer, political structure and municipal manager.¹⁴⁰ A political office bearer is defined as meaning the speaker, the executive mayor, deputy executive mayor, the

¹³⁶ As indicated in the terms of reference.

¹³⁷ Ekurhuleni Metropolitan Municipality *System of Delegations* 2011 5.

¹³⁸ S 37 and 56, respectively, Structures Act.

¹³⁹ S 53(1) Systems Act.

¹⁴⁰ S 59(1) (a) Systems Act.

mayor, deputy mayor, or a member of the executive committee.¹⁴¹ These, and the municipal manager, are the office bearers for which terms of reference may be made. All office bearers being assessed in this part, i.e., the speaker and the executive mayor are within the definition of political office bearer subject to terms of reference, except for the chief whip. The chief whip is not a political office bearer and the drawing of terms of reference is not mandatory. All the metropolitan municipalities under study, however, have made terms of reference for the chief whip. In that regard, for the purpose of this study, the chief whip is considered as a political office bearer.

4.2.2.1 The Speaker

In terms of section 37 of the Structures Act, the speaker is in charge of the council processes. The terms of reference and delegations of the municipalities under review have entrusted similar powers and functions to the speaker. As far as delegations are concerned, the speaker of the City of Cape Town, for instance, has been given powers to oversee the council chamber and coordinate functions of sub councils.¹⁴² He or she has the power to determine administrative arrangements for ward meetings as well as to oversee their establishment and coordination, to monitor them, and report and recommend to the council on the performance of sub councils, ward forums, as well as section 79 committees. The sub-councils and ward forums serve the purpose of the council processes and therefore under the overall authority of the speaker. The speaker is also responsible for the expenditure of his or her office, and has the duty to enforce rules for declaration of assets and interest.¹⁴³

Most of the powers delegated to the Speaker correspond with the powers and functions already given by statute and are generally related to the council processes, rules of order, code of conduct and integrity of the council. There are no detailed executive or

¹⁴¹ S 1 Systems Act.

¹⁴² S 15 City of Cape Town *System of Delegations*.

¹⁴³ City of Cape Town *System of Delegations* 65-68.

administrative functions, except as they relate to the office of the speaker. The scope of allocation of responsibilities ensures that the office of the speaker is separated from the executive and administration, and at the same time independent.

Similarly, in the City of Johannesburg, the speaker has authority on matters that relate to community involvement, mechanisms to build the capacity of councillors and communities, on systems to manage petitions, on official languages of the City, on projects in respect of the functions of the Speaker's office, and the monitoring and regulation of the performance of ward committees.¹⁴⁴ The speaker also has authority to approve amendments to the organisational structure of the Office of the Speaker. As a check on the exercise of power by the speaker, the speaker has the responsibility of reporting to the Section 79 Rules Committee quarterly on the activities of the office of the Speaker.¹⁴⁵ The responsibilities and the functions of the speaker include some administrative and executive related functions, but only in so far as they relate to the office of the speaker. Such allocation of administrative and executive functions is necessary to keep the speaker independent from the executive. That enhances the separated status of the speaker from the executive mayor. Overall, however, the responsibility of managing expenditure for the whole of the municipality rests with the municipal manager.¹⁴⁶

In Ekurhuleni Metropolitan Municipality, the powers and functions of the speaker have been categorised into three. These are; (a) those related to public participation under which the speaker has been given the authority of approving mechanisms devised to involve the community in the affairs of the City, to approve all systems to manage petitions, and to monitor and regulate the performance of ward committees, among others; (b) authority related to the legislature under which the speaker has responsibility to submit reports and

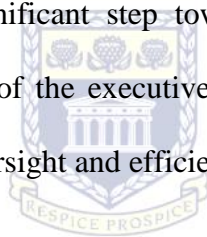
¹⁴⁴ City of Johannesburg *Terms of Reference for the Speaker* 2006 2.

¹⁴⁵ City of Johannesburg *Terms of Reference for the Speaker* 2006 2.

¹⁴⁶ S 65(1) MFMA.

recommendations to the council and to committees on matters within the scope of the committees, and to ensure development of standing rules of the council as well as to ensure that ward committees are set up; and (c) the general powers and functions under which the speaker is the convener of programming and rules committees and other related functions.¹⁴⁷

The powers of the speaker relate to the council processes, meetings, petitions, ward committees and council committees. There are virtually no executive or administrative functions except those related to the speaker's office. In terms of separation of powers, the authority of the speaker has been delimited to the council, ward committee and petition processes. They are functions dealing with the council as opposed to the executive. These are, therefore, specialised functions of the speaker differentiated from executive and administrative functions. It is a significant step towards the segregation of powers and functions of the speaker from those of the executive and administration. The arrangement creates relationships conducive to oversight and efficiency.



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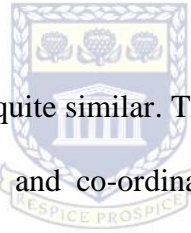
4.2.2.2 The Chief Whip

None of the metropolitan municipalities under review make mention of any statutory powers and functions of the chief whip because the chief whip is not an office established by legislation and is also not within the definition of political office as earlier noted. However, the terms of reference for the municipalities under review have allocated functions to the chief whip. As was stated above, terms of reference can be made to political office bearers, the definition of which does not include the chief whip. The allocation of powers and functions to the chief whip in terms of reference is not mandatory. In terms of delegation,

¹⁴⁷ Ekurhuleni Metropolitan Municipality *System of Delegations* 44.

nevertheless, there is an express legal authorisation since a chief whip is a councillor to whom the council may delegate as permitted by legislation.¹⁴⁸

In the case of City of Cape Town, the functions of the chief whip seem to be closely related to those of the speaker. They include the power to approve, in consultation with the speaker, the use of office and meeting space by councillors and political parties, to grant leave of absence to councillors from meetings of the council and committees, to determine developmental needs of councillors in consultation with party whips and to develop a programme of training for the councillors.¹⁴⁹ The main functions of the office in summary is to co-ordinate between the council and the political parties, to assist the speaker in some council processes where political parties' input is required, and coordinates the office of the speaker to the political parties.



A situation at City of Johannesburg is quite similar. The chief whip has powers and functions mainly dealing with the relationships and co-ordination between all political parties, the maintenance of discipline among all councillors, the approval of requests by any political party to conduct meetings, ensuring the allocation of councillors to the various committees, attending to disputes between political parties, among others.¹⁵⁰ However, there are some powers and functions allocated to the Chief Whip which may be rightly classified as executive or administrative, only in so far as they are related to the functions of the office of the Chief Whip.

In the Ekurhuleni Metropolitan Municipality the Chief Whip is also responsible for maintaining working relationships between political parties in the council and as well as for allocation of councillors to committees in consultation with the speaker and party whips. He

¹⁴⁸ S 59(1)(a) and (b) Systems Act.

¹⁴⁹ City of Cape Town *System of Delegations* 69-70.

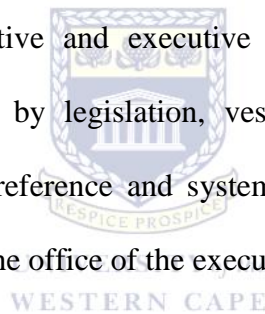
¹⁵⁰ City of Johannesburg *Terms of Reference for the Chief Whip* 2006 1-2.

or she is responsible for coming up with a strategy for effective debate. The Chief Whip, in consultation with the speaker, nominates councillors to attend national and international seminars, congresses, or meetings subject to council's policy and delegation.¹⁵¹

What can be observed, in as far as separation and segregation of powers is concerned, is that the functions of the Chief Whip's office revolves around council related processes and functions as opposed to executive functions. The allocation of functions of the chief Whip in such a manner contributes to the segregation of the executive and legislative powers and functions at municipal level.

4.2.2.3 The Executive Mayor

The municipalities under review have allocated powers and functions to the executive mayor in a manner that separates legislative and executive functions. They have adopted the executive mayoral system which, by legislation, vests the executive leadership in the executive mayor.¹⁵² The terms of reference and systems of delegation have allocated and delegated powers and functions to the office of the executive mayor in a similar manner.



The system of delegations in the City of Cape Town allocates and delegates to the executive mayor civil and ceremonial duties such as receiving delegates, making media statements, opening projects, presenting honours and mementos, and powers to appoint senior officials of utility agencies, as well as determine appropriate policies to be adopted by the council.¹⁵³ The executive mayor exercises the council's executive authority in a similar way as exercised by the President at national level or a premier at the provincial level. The difference is that in the case of the President or a premier the powers are directly conferred by the Constitution or legislation and are not exercised on behalf of Parliament or the provincial legislature. The

¹⁵¹ Ekurhuleni Metropolitan Municipality *System of Delegations* 45.

¹⁵² S 7(b) Structures Act.

¹⁵³ City of Cape Town *System of Delegations* 58.

executive mayor, however, merely exercises executive authority of the council¹⁵⁴ and the council itself may, in appropriate cases, exercise the executive functions.¹⁵⁵ Nevertheless, there is some notable demarcation between the executive powers exercised under the leadership of the executive mayor and the functions and processes under the control of the speaker.

In the City of Johannesburg, the general function of the executive mayor, according to the terms of reference, is the execution of executive powers or duties on behalf of the Council. That power is subject to powers reserved for the Council and those delegated to any political structure, political office bearer, councillor or official.¹⁵⁶ Specifically, the executive mayor has authority in municipal relations, finance, municipal services and entities and authority on legal and staff matters.¹⁵⁷ These are executive functions as was defined by the court in *Fedsure* and *Mnquma* decisions discussed earlier.¹⁵⁸ The manner in which the powers have been allocated, there is a degree of separation and segregation of powers and functions between the executive headed by the executive mayor and the powers, functions and processes of the council.

Ekurhuleni Metropolitan Municipality, in the wording of the system of delegations, has transferred the execution of all powers, functions and duties of the council to the executive mayor, subject to what has been specifically provided by legislation or delegation.¹⁵⁹ Under legislation, however, the executive power may be exercised with assistance of or in conjunction with the members of the mayoral committee.¹⁶⁰ The broad delegation of all executive functions to the executive mayor gives the executive mayor wider powers than is

¹⁵⁴ S 7(b) Structures Act.

¹⁵⁵ See *Manana V King Sabata Dalindyebo Municipality* (345/09) [2010] ZASCA 17.

¹⁵⁶ City of Johannesburg *Terms of Reference for the Executive Mayor* 7.

¹⁵⁷ City of Johannesburg *Terms of Reference for the Executive Mayor* 2006 8-9.

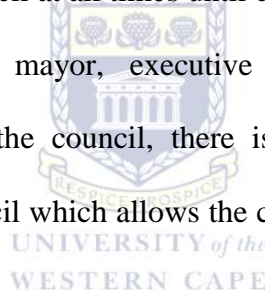
¹⁵⁸ Section 2.3.3 above.

¹⁵⁹ Ekurhuleni Metropolitan Municipality *System of Delegations* 2011 47.

¹⁶⁰ S 60(1) (a), (b) and (c) and 60(3) Structures Act.

the case in the other metropolitan municipalities under review. It is clear from the system of delegations that the executive powers and functions have been entrusted to the executive mayor with the aid of the mayoral committee, whereas the rest of the powers and functions remain with the council.

The designation by legislation of the executive mayor as the head of the executive functions sets a paradigm that is being followed by the municipalities assessed. However, the executive mayor and members of the mayoral committees are councillors and remain members of the council. They are a separate functionary when exercising executive functions, and yet part and parcel of the council when it exercises its legislative and oversight functions. The executive mayor and the mayoral committees are elected from the council and they continue to be members of the council at all times until council membership ends. Regardless of the fact that the executive mayor, executive committee members or mayoral committeemembers form part of the council, there is a limited segregation between the executive functionary and the council which allows the council to exercise oversight over the executive.



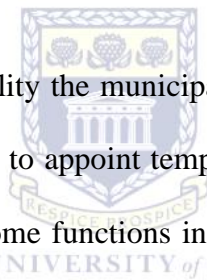
4.2.2.4 The Municipal Manager

By legislation the municipal manager is the head of the administration of the municipality.¹⁶¹ He or she is accountable and responsible for the administration's formation, development and management in an efficient, economical and legislative compliant manner.¹⁶² The terms of reference and system of delegations of the municipalities assessed are cognisant of the powers and functions of the municipal manager in terms of legislation. They have allocated or delegated the powers and functions in a manner that does not contradict with those allocated by legislation.

¹⁶¹ S 54A (1) (a) Systems Act.

¹⁶² S 55 (1) (a) and (b) Systems Act.

At the City of Cape Town, the municipal manager has been allocated powers to appoint senior officers such as the chief fire officer, the head of political management centre and the deputy information officers. The authority of the municipal manager includes the power to develop systems of personnel administration, powers in relation to procurement, and the authority to authorise certain legal processes, among others.¹⁶³ It does not differ much from the powers and functions of the municipal manager of the City of Johannesburg where his or her principal function is to assist the executive mayor in complying with his or her responsibility in respect of powers and functions reserved for the council.¹⁶⁴ However, the designation of the function of the municipal manager is a bit generic and it seems to suggest that the municipal manager performs functions which are executive in nature, over and above the administrative functions.



In Ekurhuleni Metropolitan Municipality the municipal manager has been delegated powers to initiate policy and by-laws, powers to appoint temporary employees and students, powers to dismiss staff, to grant leave and some functions in relation to supply chain management, among others.¹⁶⁵ These are administrative functions and do not differ in substance with the other two metropolitan municipalities under review. The allocation is also in line with the designation by legislation of the municipal manager as head of the administration.

The powers and functions allocated or delegated to municipal managers in the three metropolitan municipalities under study can well be classified as administrative. However, the separation of the administrative functions from the executive functions is not that obvious. Some of the functions allocated to the municipal manager are executive functions. This is more manifest in the City of Johannesburg where the general function of the municipal manager is to assist the executive mayor. In addition to that, it is necessary to draw

¹⁶³ City of Cape Town *System of Delegations* 182- 204.

¹⁶⁴ City of Johannesburg *Terms of Reference for the City Manager* 2006 1.

¹⁶⁵ Ekurhuleni Metropolitan Municipality *System of Delegations* 2011 81.

a clear distinguishing line between the executive functions and the administrative functions to avoid instances where the executive may encroach in administrative matters. The exercise of administrative powers and functions of the municipal managers has been subjected to policy direction of the municipal council.¹⁶⁶ The council has the power to involve itself in administrative matters through policy. The decision of the Supreme Court of Appeal in the *Manana*¹⁶⁷ case, which held that the administrative functions to appoint staff of a municipality can also be exercised by the council itself, further distorts the distinction line between administration and the council. The effect of the court decision is that it allows the council to exercise powers and functions of the administration, whether given by statute or delegation.¹⁶⁸

4.3 UTILISATION OF SECTION 79 COMMITTEES AS STRUCTURES FOR OVERSIGHT

Municipalities may allocate oversight powers and functions to structures to facilitate oversight. The structures that may be used include section 79 committees. Section 79 committees have been used by the municipalities for oversight functions and will be examined in this part. The focus of the examination is on the roles and responsibilities allocated to the section 79 committees and whether these committees do facilitate oversight..

4.3.1 City of Cape Town Metropolitan Municipality

The City of Cape Town has divided its section 79 committees into two groups; section 79 portfolio committees and section 79 standing committees.

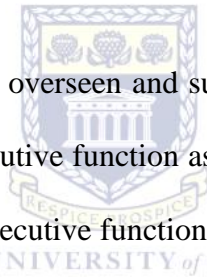
¹⁶⁶ S 55 (1) Systems Act.

¹⁶⁷ *Manana V King Sabata Dalindyebo Municipality* (345/09) [2010] ZASCA 14.

¹⁶⁸ Nthiliziywana P 'Insulating Administrative Decision Making Relating to Individual Staff Appointment from Political Meddling: *Manana v King Sabata Dalindyebo*' in *South African Law Journal* 129 (2012) 56 dissents with the court, arguing that the national government is permitted by the Constitution to regulate the exercise by a municipality of its executive authority.

4.3.1.1 Portfolio Committees

There are eleven portfolio committees at the City of Cape Town.¹⁶⁹ These being section 79 committees, their members and chairpersons are appointed by the council. The portfolio committees have generic functions which include development of policy, drafting of by-laws and business plans, and making recommendations on the draft IDP, budget, tariffs, levies, taxes and duties. The portfolio committees assess the performance of service delivery within the functional area of the committee and they monitor outcomes, identify needs of the municipality and make recommendations to the executive mayor. They have the power to require councillors and/or officials to appear before any of these committees to assist in the performance of its duties.¹⁷⁰ The power to summon is significant in terms of performance of oversight functions.



Each executive portfolio is constantly overseen and supervised by the committees. From the point of view of the definition of executive function as explained in the *Mnquma* case above, the function to develop policy is an executive function. In this particular case, however, it has been allocated to the portfolio committees. The way this executive function has been allocated to the portfolio committees does not align with the notion of separation of powers. Portfolio committees are made under section 79 of the Structures Act and ought to be separated from the executive and ought not exercise executive functions. In terms of oversight, the efficiency in overseeing the municipal executive may be impeded by the fact that the committees are actively involved in executive functions.

4.3.1.2 Standing Committees

There are also other section 79 committees loosely referred to as standing committees. These are the Homeless Agency Committee, the Rules Committee, the Standing Committee of

¹⁶⁹ City of Cape Town *System of Delegations* 72.

¹⁷⁰ Under City of Cape Town *System of Delegations* 74-113.

Public Accounts (SCOPA) and the Spatial Planning, Environment and Land Use Management Committee (SPELUM). The Homeless Agency Committee has political oversight functions on matters related to homeless people and makes recommendations to the executive mayor.¹⁷¹

The Rules Committees is responsible for rules of procedure of the council, sub councils and committees. It reports to the council and not the executive mayor. The Rules Committee does not have any oversight functions over the executive.¹⁷²

SCOPA performs oversight functions over the executive functionaries on behalf of the council.¹⁷³ This is the strongest committee in terms of oversight. It is allocated the power to review financial statements, audit reports and annual reports, including overseeing the adoption of the oversight report.¹⁷⁴ It is specifically responsible for promoting good governance, transparency and accountability on the use of municipal resources and therefore vested with power to investigate and advise the council in respect of unauthorised, irregular or fruitless and wasteful expenditure.¹⁷⁵ To enable it exercise its functions it has been vested with the power to access any information, documents and reports and to require councillors, officials, chairpersons of municipal entity boards and directors to attend any meeting or interview and report on matters on agenda.¹⁷⁶ Thus, apart from portfolio committees which are charged with oversight functions, SCOPA has also been entrusted with oversight powers over the executive and administration. Standing committees have specific functions and are generally responsible for that function in the council, whereas portfolio committees oversee a particular portfolio.

¹⁷¹ City of Cape Town *System of Delegations* 115.

¹⁷² City of Cape Town *System of Delegations* 114.

¹⁷³ City of Cape Town *System of Delegations* 134.

¹⁷⁴ City of Cape Town *System of Delegations* 134.

¹⁷⁵ City of Cape Town *System of Delegations* 135.

¹⁷⁶ City of Cape Town *System of Delegations* 134-138.

4.3.2 City of Johannesburg Metropolitan Municipality

The City of Johannesburg has also made use of section 79 committees. It has categorised section 79 committees into two; section 79 portfolio committees and section 79 standing committees.¹⁷⁷

4.3.2.1 Section 79 Portfolio Committees

The portfolio committees have the responsibility to oversee the activities of a particular executive portfolio. The City of Johannesburg has an executive mayoral system of a municipality having a mayoral committee in which each member is responsible for an executive portfolio. According to the terms of reference, the section 79 portfolio committees are given generic functions which are classified as legislative, financial and oversight functions.



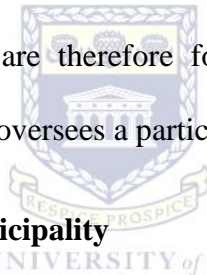
The legislative functions of the committees include the consideration of draft IDP and overseeing its implementation, the implementation of by-laws and policies, and deliberating on the annual report in as far as it relate to the respective portfolio. The financial functions are the consideration of draft budgets and draft tariffs, fees and charges in respect of the respective portfolio. The oversight functions include the consideration of matters referred to the committees by the Member of the Mayoral Committee (MMC) of the relevant portfolio, overseeing the particular portfolio, and the consideration of quarterly reports from the relevant MMC and departments.¹⁷⁸ The section 79 portfolio committees at Johannesburg are designed to facilitate oversight. First, they have not been allocated executive function nor are they answerable to the executive, but they are separated from the executive. Secondly, they have been allocated powers and functions that enable the committees to remain watchful over the executive.

¹⁷⁷ City of Johannesburg *Integrated Development Plan 2011/2012* 14.

¹⁷⁸ As observed from the Terms of Reference of all the Portfolio Committees of City of Johannesburg.

4.3.2.2 Section 79 Standing Committees

Apart from section 79 Portfolio Committees, there are also section 79 standing committees which are five in number. The Municipal Public Account Committee (MPAC) is the standing committee which has been entrusted with strong political oversight functions.¹⁷⁹ According to the terms of reference, MPAC is responsible for overseeing the financial statements and annual report of the municipality and its entities. It monitors expenditure of the municipality to ensure that the budget and SDBIP are complied with.¹⁸⁰ These are very critical functions of MPAC. The MPAC has the right to request any member of staff of the City or its entities, any councillor or member of a Board of the entities to attend meetings of the Committee. This is very important in the exercise of the MPAC's oversight function as it allows the committee to call any person and require production of any documents or make any explanation as may be necessary. The standing committee are therefore for a specific function as opposed to portfolio committees which generally oversees a particular portfolio.



4.3.3 Ekurhuleni Metropolitan Municipality

At Ekurhuleni Metropolitan Municipality, section 79 committees are categorised into section 79 political management committees, section 79 portfolio committees and section 79 standing committees.

4.3.3.1 Section 79 Political Management Committees

There are three political management committees; the Rules Committee, Programming Committee and the Ethics and Disciplinary Committee.¹⁸¹ The political management committees are categorised as legislative committees by the system of delegations itself. They do not have any oversight functions but are responsible for the management of the affairs of councillors and processes relating to councillors. These committees do not have significant

¹⁷⁹ City of Johannesburg *Terms of Reference for the Speaker* 2006 1.

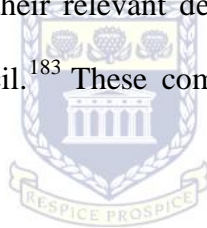
¹⁸⁰ City of Johannesburg *Terms of Reference of MPAC* 2006.

¹⁸¹ Ekurhuleni Metropolitan Municipality *System of Delegations* 21.

bearing on the separation of powers of the municipality, although they have a bearing on oversight, especially in the rules making process.

4.3.3.2 Section 79 Portfolio Committees

Section 79 portfolio committees are referred to in the system of delegations for Ekurhuleni as oversight committees.¹⁸² They are each linked to a specific executive portfolio or department. They are vested with generic functions, including overseeing the activities of departments within their area of responsibility, the consideration of policy and by-laws as it relates to the particular relevant department and the making of recommendations thereof to the council. These portfolio committees also have powers of programming and scheduling of debates on matters of public interest. They are responsible for monitoring and overseeing budgets, expenditure and service delivery of their relevant departments, and to consider as well as make recommendations to the council.¹⁸³ These committees are designed as structures of oversight over the executive.



4.3.3.3 Section 79 Standing/specialised Committees

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There are also section 79 standing committees one of which is the MPAC. The system of Delegations of Ekurhuleni Metropolitan Municipality has classified the MPAC as a specialised committee.¹⁸⁴ It has oversight functions and has the responsibility to foster accountability. It oversees all programmes of the municipality and investigates value for money on projects, planning and general expenditure.¹⁸⁵ The MPAC has powers to summon any person to give evidence as well as hold public hearings and to instruct individuals and

¹⁸² Ekurhuleni Metropolitan Municipality *System of Delegations* 23.

¹⁸³ Ekurhuleni Metropolitan Municipality *System of Delegations* 23.

¹⁸⁴ Ekurhuleni Metropolitan Municipality *System of Delegations* 16.

¹⁸⁵ Ekurhuleni Metropolitan Municipality *System of Delegations* 26.

committees to be present and answer questions.¹⁸⁶ This enables the MPAC to exercise its functions effectively.

4.4 THE PRACTICE OF ANNUAL REPORTING AND MID-YEAR BUDGET AND PERFORMANCE ASSESSMENT REPORTING

The MFMA requires municipalities to report its activities annually through an annual report, and mid-way in a financial year, through a mid-year budget and performance assessment.¹⁸⁷ This is one of the mechanisms put in place by legislation to facilitate transparency, accountability and oversight. This part of the study examines how the legislative requirements have been put in practice in the municipalities under review to facilitate oversight. The examination begins with the annual reporting, followed by the mid-year reporting.



4.4.1 Annual reporting as an oversight process

4.4.1.1 Annual Reporting at City of Cape Town Metropolitan Municipality

The City of Cape Town restates the legal requirement of annual reporting as provided by the MFMA.¹⁸⁸ First, the system of delegations has given the Executive Mayor the power to present the annual report to the council.¹⁸⁹ This is however nothing more than what the MFMA has provided. The system of delegations in this respect has defined “presenting” to include preparing.¹⁹⁰ It is, therefore, the responsibility of the executive mayor to prepare and table the annual report in the council as required by legislation. The preparation of the annual report by the executive mayor is coordinated by the municipal manager.¹⁹¹

¹⁸⁶ Ekurhuleni Metropolitan Municipality *System of Delegations* 27.

¹⁸⁷ Ss 121(1) and 72(1) MFMA.

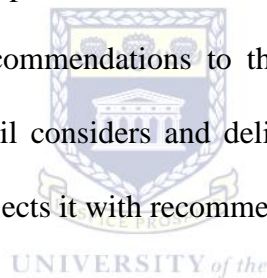
¹⁸⁸ S 121 and s 127 MFMA.

¹⁸⁹ City of Cape Town *System of Delegations* 56.

¹⁹⁰ City of Cape Town *System of Delegations* 56.

¹⁹¹ City of Cape Town *System of Delegations* 195.

The City of Cape Town has delegated to SCOPA the function of exercising oversight over the annual report.¹⁹² SCOPA considers and evaluates the City's annual report as well as annual reports of municipal entities under it. As an oversight committee, it makes recommendations on the annual report to the council through an oversight report. It further has powers to review and follow up on past recommendations. This practice is in line with guidelines from the National Treasury under MFMA Circular no 32 which recommends the use of MPACs as oversight committees.¹⁹³ In practice, the process of considering the annual report after it is tabled in the council entails that all portfolio committees and sub councils are furnished with copies of the annual report. They then deliberate on it and submit their comments to SCOPA. SCOPA organises a meeting with the executive management where all necessary concerns on the annual report are raised and discussed. Thereafter SCOPA drafts an oversight report and makes recommendations to the council on whether to adopt the annual report or not.¹⁹⁴ The Council considers and deliberates on the oversight report and either adopts the annual report or rejects it with recommendations.¹⁹⁵



The practice of annual reporting at City of Cape Town creates an opportunity for the council and the committee to consider the performance of the executive and raise queries and make recommendations, if necessary. The process facilitates *ex-post* oversight opportunity over the executive. However, the practice is not only resulting from the use of internal rules of procedure, but also from the prescriptions of the MFMA and the circulars made under the MFMA by the National Treasury.

¹⁹² City of Cape Town *System of Delegations* 134.

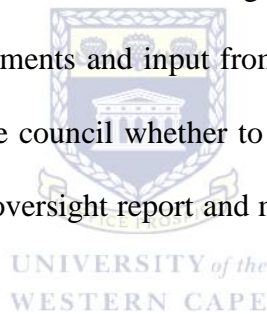
¹⁹³ City of Cape Town *Oversight Report on Annual Report for the 2010/2011 Financial Year 2*.

¹⁹⁴ City of Cape Town *Oversight Report on Annual Report for the 2010/2011 Financial Year 2*.

¹⁹⁵ MFMA circular number 32 and s 129 MFMA.

4.4.1.2 Annual Reporting at City of Johannesburg and Ekurhuleni Metropolitan Municipality

In the City of Johannesburg Metropolitan Municipality the practice is almost the same,¹⁹⁶ except for the fact that it has not specifically obliged the executive mayor to prepare the annual report. The duty of the executive mayor is merely to table the annual report in the Council. Similar to the City of Cape Town, section 79 Portfolio committees consider the annual report, especially as it relates to their respective portfolio and make recommendations accordingly to the council.¹⁹⁷ The MPAC of the City of Johannesburg is also allocated the responsibility to exercise some oversight through the annual report process and it makes recommendations to the council and the executive mayor. The MPAC, as required by the guidelines of the National Treasury,¹⁹⁸ drafts an oversight report after scrutinising the annual report and receiving necessary comments and input from relevant individuals and organs. It then makes recommendations to the council whether to approve or reject the annual report. The council then deliberates on the oversight report and must either adopt or reject the annual report.



In Ekurhuleni Metropolitan Municipality the process is almost the same, except that the responsibility of ensuring the preparation of annual report and financial statements rests with the Member of the Mayoral Committee (MMC) for Finance.¹⁹⁹ It is observed that vesting the responsibility on the MMC is not advisable. Legislation requires that the annual report be tabled by the executive mayor. It is recommended that the person responsible for tabling should be the person preparing the report to ensure that he or she is well aware of its contents. After the annual report is tabled in the council, it is referred to the MPAC. MPAC considers

¹⁹⁶ City of Johannesburg *Oversight and Scrutiny Framework for the Council Legislature: City of Johannesburg* 2009 19.

¹⁹⁷ Generic Functions of section 79 Portfolio committees.

¹⁹⁸ MFMA Circular No 32

¹⁹⁹ Ekurhuleni Metropolitan Municipality *System of Delegations* 67.

and scrutinises the report after receiving comments from various stakeholders, including the portfolio committees, and makes recommendations to the council through an oversight report whether to adopt the annual report or not.²⁰⁰

4.4.1.3 Analysis of the Annual Report Processes

The above is the standard process in the local context of the municipalities under review in respect of annual reporting. In the process, proper oversight by the council entails a meaningful debate and engagement by the council on the annual report when it is first tabled and after it is referred back with an MPAC oversight report. The reality on the ground does not show meaningful engagement by the council or committees, except in MPAC. For instance, in the City of Cape Town, there were concerns raised by the chairperson of SCOPA that portfolio committees were not deliberating sufficiently on the annual report when referred to them. They were merely taking note of the report.²⁰¹ It was pointed out that the lack of deliberation was caused by the fact that most councillors and chairs of portfolio committees did not take an offer to undergo training. The scenario is indicative of poor capacity of councillors and committees to meaningfully deliberate on the annual report. This is attributed to the lack of comprehension of the annual report by most of the councillors.²⁰²

The lack of capacity to meaningfully deliberate also exists in the other metropolitan municipalities. In Ekurhuleni Metropolitan Municipality, for example, the trend is that a report is merely noted in the council and referred to MPAC without much debate. For instance, when the Auditor General presented a report to the council, the council merely took

²⁰⁰ Ekurhuleni Metropolitan Municipality MPAC Report on the Auditor General Findings on 2009/2010 Financial Year Considered in Council Meeting of 26/11/2011 3.

²⁰¹ City of Cape Town *Standing Committee on Public Accounts (SCOPA) Minutes No 04/05/11* 2011 6.

²⁰² A similar problem of lack of appreciation and engagement by non-executive councillors was observed in Drakenstein Municipality in Williams E A *Improving political oversight in municipalities: examining the law and practice surrounding oversight by the Council over the municipal Executive and the municipal administration* (unpublished research paper) 2012 50.

note of the report and referred it to MPAC for oversight.²⁰³ This indicates a tendency of overreliance on MPACs for scrutiny and questioning, and reduces the council's role to one of merely endorsing what is in the reports. Although the MPACs do provide oversight on behalf of the council, the council needs to engage in a meaningful debate on the annual report for effective and efficient oversight.

A process of annual reporting does facilitate consideration by the council, MPAC, portfolio committees and other organs of the performance and progress of the municipality. It is a practice that is in place in the metropolitan municipalities under. However, there are notable deficiencies in the nature of the debate and deliberations in the council and committees. It is recommended that measures should be put in place to train and build the capacity of councillors to enable them engage in the council and committee deliberation.

4.4.2 Mid-year budget and performance assessment reporting as an oversight process

The municipalities under study have also localised the requirements for the municipal manager assesses the performance of the municipality in course of implementing the budget and submit a report to the executive mayor. The executive mayor then submits a report to the council.²⁰⁴ The process in the metropolitan municipalities under review is discussed below.

4.4.2.1 City of Cape Town Metropolitan Municipality

In the case of the City of Cape Town, the responsibility has been split. The Finance Directorate submits the financial assessment part. The Performance Management Department compiles a report on service delivery performance assessment.²⁰⁵ In that respect, the municipal manager has the responsibility of coordinating the process to make sure that they

²⁰³ Ekurhuleni Metropolitan Municipality *MPAC Report on the Auditor General's Findings for the 2009/2010 Financial Year 1*.

²⁰⁴ Ss 72(1) and 54(1) (f) MFMA.

²⁰⁵ City of Cape Town *Mid-year Performance Assessment Report 2006 2*.

are combined before submitting to the executive mayor.²⁰⁶ The executive mayor then reports to the council.

4.4.2.2 City of Johannesburg Metropolitan Municipality

In the City of Johannesburg the practice appears to be reliant on legislation. There is no dedicated policy of the City setting out the process. The practice, nevertheless, is that each department and entity submits a mid-term budget and performance assessment to the municipal manager where it is consolidated and dealt with as required by legislation. It is submitted to the mayor who in turn submits it to the council.

4.4.2.3 Ekurhuleni Metropolitan Municipality

In Ekurhuleni Metropolitan Municipality the Budget Implementation Policy provides a guide on the mid-year budget and performance assessment. As per the policy, the practice stems from the assessment of the Service Delivery and Budget Implementation Plan (SDBIP) results. This process is informed by MFMA Circular No 13 of the National Treasury.²⁰⁷ The accounting officer, according to the policy, is responsible for the assessment report in line with what legislation has prescribed.²⁰⁸ In case there are any financial budget adjustments which may be made as a result of the review, they are facilitated by the finance department but are in practice referred to the Budget steering committee²⁰⁹ and portfolio committees which will make recommendations before the council adopts them.²¹⁰ The process allows the council and its committees to exercise oversight over the executive and administration against budget and SDBIP. The practice provides an opportunity for the council to oversee the executive and administration midway through the implementation of the budget and SDBIP,

²⁰⁶ City of Cape Town *System of Delegation* 194.

²⁰⁷ Ekurhuleni Metropolitan Municipality *Budget Implementation and Monitoring Policy* 2011 6.

²⁰⁸ S 72 MFMA.

²⁰⁹ A special committee set to oversee budgeting process.

²¹⁰ Ekurhuleni Metropolitan Municipality *Budget Implementation and Monitoring Policy* 7.

thereby providing concurrent oversight. The localisation of the process ensures increased oversight avenues and contributes to overall better oversight.

4.5 CRITICAL ASSESSMENT OF THE MODELS

This part analyses the models of governance in the municipalities under review and answers the questions whether there is a separation of powers in the municipalities under review or whether existing practices do facilitate meaningful oversight.

4.5.1 The systems of governance and separation of powers

The main question to consider in this part is whether the systems of governance in the metropolitan municipalities under review delineate executive powers and functions from legislative powers and functions. Before attempting to answer the question, it is pertinent to make general observations in relation to the common practice in jurisdictions where the doctrine of separation of powers is applied. The first observation is that there is no universal model of separation of powers.²¹¹ Each constitutional regime designs its own model or manner of separation of powers. This also applies to municipalities when designing their own systems of governance. The second observation is that in any democratic system with separation of powers and checks and balances, there cannot be an absolute separation of the executive and legislature. What normally exist are schemes of partial separation and partial interaction, other than wholly disjointed executive and legislature.²¹²

In answering the question whether the models under review have a separation of powers, it is suggested that the approach taken by the Constitutional Court in the *Certification* judgment²¹³ should be used. In answering the question whether the 1996 Constitution provides a

²¹¹ O'Regan J, quoting the Constitutional Court in *Re: Certification of the Constitution of the Republic of South Africa* 1996 (10) BCLR 1

²¹² *Re: Certification* 108-109

²¹³ *Re: Certification* Para 113.

separation of powers as was required in the Constitutional Principles,²¹⁴ the Constitutional Court rejected the contention that since there was no complete separation, the requirement was not satisfied.²¹⁵ It was observed that even though the members of the executive forms part of Parliament and provincial legislature, there is a separation of powers as legislative functions are vested in parliament and provincial legislature, while executive functions are in the President and the premier, respectively.²¹⁶

In assessing the models of the metropolitan municipalities, a similar question as to whether there is a separation of powers arises. The approach used by the Constitutional Court in the *Certification* judgment may be used, with due consideration of the following factors. First, all the three municipalities have drawn a line between the executive and the council.

Nevertheless, the executive and the council still integrate in the sense that members of the executive are also members of the council and the executive is answerable and accounts to the council. Secondly, the powers, functions and responsibilities have been allocated in a segregated manner by the three metropolitan municipalities. The powers, functions and responsibility of the council processes are under the leadership of the speaker, the chief whip, or the chairpersons of the committees. On the other hand, the powers, functions and responsibility of initiating policy, by-laws, budget, IDP and execution of the functions of the municipality are essentially under the leadership of the executive mayor. If the approach taken by the Constitutional Court in determining whether there is a separation of powers is used, it may be concluded that there is a separation of powers in these municipalities.

The above conclusion, however, is muted by the Constitution and legislation. The Constitution and legislation both expressly vest executive and legislative authority in the

²¹⁴Constitutional Principal IV *Interim Constitution* 1993.

²¹⁵*Re Certification* Judgment Para 111.

²¹⁶*Re Certification* Judgment Para 110.

council,²¹⁷ which is in contradiction with the conclusion. Furthermore, drawing such a conclusion would be inconsistent with legislation on two reasons. First, the allocation of responsibilities in the terms of reference must be within legislative framework.²¹⁸ To conclude that there is a separation of powers would contradict section 11(1) of the Systems Act which provides for a conflation of powers. Secondly, it is strictly required that delegation may not conflict with the Constitution, the Systems Act and the Structures Act.²¹⁹ Construing the practice in the three municipalities as creating a separation of powers, on a system partly created by delegations, would not be in line with the requirements set by legislation on delegation.

With such limitations in the Constitution and legislation, it is submitted that instead of stating that there is a separation of powers in these three municipalities, or in any municipality, the correct approach should be to state that there is a separation of functions. Maintaining that there is a separation of powers, in the sense of the doctrine, runs counter to the Constitution and legislation. Further to that, most of the powers and functions allocated to the executive are either delegated or vested by legislation and may be revoked or exercised by the council itself.²²⁰ If the approach taken by the Constitutional Court in the *Certification* judgment is used, the practice in the three metropolitan municipalities separating the council and the executive may be said to be a separation of powers in the sense of the doctrine. However, the clear vesting of both executive and legislative powers to the council by the Constitution and legislation, and the overriding power of the council to exercise any of the executive functions, whittles down the separation of powers.

²¹⁷ S 151(2) Constitution and s 11(1) Systems Act.

²¹⁸ S 53(1) Systems Act.

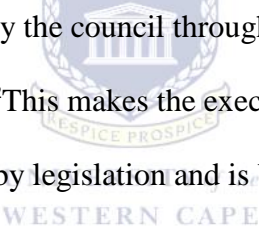
²¹⁹ S 59(2)(a) Systems Act.

²²⁰ See *Manana* case Para 14.

Regardless of the fact that the separation of powers between the executive and the council in the municipalities under review is whittled down, the practice in those metropolitan municipalities may still facilitate oversight over the executive. An elaborate assessment on whether the governance models under review facilitate oversight is done below.

4.5.2 The systems of governance and facilitation of oversight

A question that this part attempts to answer is whether the systems in the three metropolitan municipalities do facilitate oversight relationships and avenues that may translate to effective oversight. An assessment of the models indicates that the metropolitan municipalities have adopted models of governance, and have made use of legislative mechanisms that have the potential of enhancing oversight over the executive and administration. Such a conclusion is drawn on consideration of the following factors:-

- 
- (i) The executive is appointed by the council through elections,²²¹ and may be removed from office by the council.²²² This makes the executive answerable to the council, a mechanism that is provided by legislation and is being practiced in the models examined.
 - (ii) The executive mayor reports back to the council in terms of all decisions taken by him or her.²²³ He or she reports to the council on the performance of delegated powers and exercise of functions as any officer bearer or structure receiving delegated powers.²²⁴ These reporting requirements and mechanisms allow the council to exercise oversight over the executive mayor.

²²¹ S 43(1) Structures Act in the case of the executive committee and s 55(1) Structures Act in the case of the executive mayor.

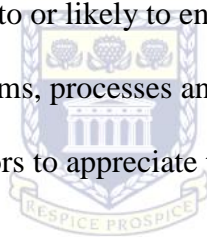
²²² S 53(1) Structures Act in the case of the executive committee and s 58 Structures Act in the case of the executive mayor.

²²³ S 56(5) Structures Act.

²²⁴ S 63 Systems Act.

- (iii) There is some segregation between the executive and the council which allows the executive to exercise their functions and the council to review, monitor, recommend and direct. The segregation, however, is limited by overriding powers of the council and the fact that members of the executive also form part of the council.
- (iv) The section 79 committees in the three metropolitan municipalities have been allocated significant oversight functions which are exercised on behalf of the council over the executive.
- (v) The localised reporting mechanisms which are provided by legislation allow the council to oversee the executive and administration.

In a fair summation, the models in the municipalities reviewed provide structures, mechanisms and processes conducive to or likely to enhance oversight. Regardless of the existence of such structures, mechanisms, processes and avenues for oversight, there is a lack of capacity on the part of the councillors to appreciate the reports and engage meaningfully.



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4.6 CONCLUSION

This chapter has noted that the metropolitan municipalities of Cape Town, Johannesburg and Ekurhuleni use the terms of reference and systems of delegation to allocate powers and functions to office bearers and structures in a manner separating the executive and the council. By giving the speaker control over legislative processes and the executive mayor control over executive functions, legislation seems to intend some degree of separation between the council powers and functions and the executive powers and functions in. However, such intent is muted by the Constitution and legislation providing that all executive and legislative powers are vested in the council. It allows exercise by the council of all executive functions delegated or allocated by legislation and thus deviates from the doctrine of separation of powers.

The chapter has observed noted that the municipalities under review have entrusted, through the use of terms of reference and delegations, oversight functions to section 79 committees. The allocation of oversight functions to the section 79 committees allows the committees to constantly oversee the performance of the executive and administration.

The chapter further considered the usage of an annual and mid-year reporting as useful tools of oversight, but found the challenge of lack of meaningful deliberations on the reports when submitted in the council. Lastly, it is noted that the practice in the metropolitan municipalities under review does provide for some segregation between executive and the council, but the same cannot properly be called a separation of powers in the sense of the doctrine of separation of powers.

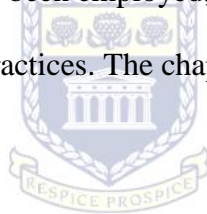


CHAPTER 5

FINDINGS, BEST PRACTICES AND RECOMMENDATIONS

5.1 INTRODUCTION

In the foregoing chapter the use of mechanisms and structures provided by legislation in the municipalities under review was examined. The examination considered how the municipalities have made use of the mechanisms and structures to design their governance systems in an effort to separate executive and legislative functions and to facilitate better oversight. Guided by the argument that purposeful use of the mechanisms provided by legislation may translate into a system of separation of powers and better oversight, this chapter presents the findings with regard to questions it set out to answer. The findings centre on the mechanisms and how they have been employed, the state of oversight structures and delimitation of powers, and the best practices. The chapter concludes with recommendations on the way forward.



5.2 FINDINGS OF THE STUDY

From the evaluation and review of the legal framework, the governance structures and prevalent practices in the metropolitans under review, the following findings and conclusions have been made:-

5.2.1 The legal framework, separation of powers and oversight

1. The constitutional scheme and legislation provide for a combination of powers and functions in the municipal council. This arrangement is justified on various reasons, including the view that municipalities do not deal with high affairs of state.²²⁵ At the same time, there are challenges that are attributed to the combination of powers.

These are general problems of governance in municipalities.

²²⁵ O'Regan J in *DA V Masondo*.

2. Legislation, nevertheless, provides some degree of separation between the executive and the council by allocating powers, responsibilities and duties of the executive separated from the council. Legislative functions are left within the scope of the council, under the control and charge of the speaker, whereas executive functions have been entrusted in the executive mayor or executive committee. This manifests an intention by the law makers to create a distinction between council and their functions on the one hand, and the executive and their functions on the other hand.
3. There is no express provision in the Constitution or legislation requiring the council to oversee the executive. However, legislation has expressly entrusted the executive mayor the authority to oversee the municipalities' provision of services and the executive mayor has an obligation to report to the council.²²⁶ A number of provisions in legislation, nevertheless, do provide avenues of oversight by the council over the executive and administration and by the executive over the administration. Such provisions include those laying down the mechanisms which have been the subject of this study and have the potential to enhance oversight and accountability.

5.2.2 The mechanisms and structures for separation of powers oversight

1. There are a number of mechanisms which are provided by legislation which are being used by the municipalities to provide for separation of powers and enhance oversight. They include the terms of reference and the systems of delegation as required by the Systems Act,²²⁷ use of annual reports, use of service delivery and budget implementation plan (SDBIP), budget statement, mid-year budget performance reviews, performance agreements, use of section 79 committees and oversight committees.

²²⁶ S 56(3) (d), (e) and (g) Structures Act.

²²⁷ S 53 and 59, respectively, Systems Act.

2. In terms of separating powers and functions, the terms of reference and delegations are very significant. These two mechanisms have enabled the municipalities under review to design their models of governance in a manner that segregates the executive from the council. It is also through the use of these mechanisms that these municipalities have allocated significant oversight powers to section 79 committees. The oversight powers and functions, however, differ from municipality to municipality. Thus the use of terms of reference is most significant in facilitating the separation of powers and function between the executive and the council, but has also some significance in enhancing oversight processes.
3. The other mechanisms listed in 1 above, are mostly useful in ensuring oversight by the council over the executive and administration and by the executive over the administration. The mechanisms do provide oversight in different stages. Budget statement and SDBIP and council processes before their approval provide concurrent oversight. Monthly and quarterly reports and the mid-year budget and performance assessment reports also ensure oversight in the implementation process and thus provide concurrent oversight. Annual reports, which are followed by oversight reports, facilitate oversight after the implementation process and thus provide *ex post* oversight.

5.2.3 Delimitation of powers, oversight and structures

1. Through the use of terms of reference and systems of delegation the powers and functions of the council as a legislative body are separated from the powers and functions of the executive. However, the separation is a result of both the use of terms of reference and delegations as well as from the allocation of powers and functions made by legislation.

2. Even though there is a separation of executive powers and functions from the council in the municipalities under review, there are limitations in construing such separation in the sense of the doctrine of separation of powers. These limitations are that, in the first place, there is a significant overlap between the executive functionaries and the council as a legislative body. Members of the executive are also part of the council. The powers, functions and responsibilities of the executive are mostly delegated from the council. This means that the council may review or reverse decisions of the executive or make the decision itself or withdraw the delegation altogether. Secondly, the express provision of the Constitution and legislation that all executive and legislative powers are vested in the council contradicts the doctrine of separation of powers. The reasonable conclusion in the circumstances is that the municipalities under review have a much muted separation of the executive and legislative functions which does not satisfy the principle of separation of powers.
3. The limited separation of powers and functions, as noted in 2 above is still of significance. It has the potential of enhancing efficiency and effectiveness, and facilitating oversight and checks and balances in the same way the application of the doctrine of separation of powers would do. To access the utility of the limited separation, it is suggested that overriding powers of the council to exercise executive functions should be cautiously exercised.
4. There is a lack of capacity to engage by the councillors in the metropolitan municipalities reviewed. The councillors in the council meetings and the committees do not effectively scrutinise, question and review reports furnished in the council or committees. This is attributed to the fact that the councillors do not appreciate the contents of the reports and lack requisite know-how on oversight processes. This deficiency renders legislative oversight over the executive inadequate.

5. Usage of the mechanisms of terms of reference and systems of delegation has enabled the municipalities to create enhanced oversight systems and structures. This provides a avenues for practical checks and balances between the executive and the council, more especially through section 79 committees.

5.3. THE BEST PRACTICES IN THE METROPOLITAN MUNICIPALITIES REVIEWED

There are some commendable practices in the metropolitan municipalities reviewed in respect of separation of the powers and functions and enhancing oversight. Those practices that can be highlighted as best practices are as below;

1. The use of section 79 committees as portfolio committees for oversight as observed in all three municipalities, instead of the use of section 80 committees. This enables the committees to exercise oversight functions efficiently, particularly because section 79 committees are not ordinarily answerable to the executive.
2. The allocation of powers and authority of initiating policy and by-laws to the executive rather than to the portfolio committees. Such authority is executive in nature and ought to be left with the executive if functions are to be separated. Allocating such powers to the portfolio committees is likely to compromise the ability of the committees to provide concurrent and *ex post* oversight on policy and by-laws since they cannot oversee their own work.
3. The allocation of some executive and administrative functions to the offices of the speaker and the chief whip in matters relating to the operation of their offices is a good practice. It ensures that these offices are not seen to be dependent on the executive or administration and that their management of the council processes and party relations are not compromised by dependence on the executive and administration.

- 4 The recognition of the executive mayor as the head of the municipality, as is the case with the City of Johannesburg, is commendable. This is a good practice as it partly resolves the uncertainty in terms of leadership of the municipality between the speaker and the executive mayor.
- 5 The adoption by the council of a policy on budget implementation and monitoring as has been done at Ekurhuleni Metropolitan Municipality is a practice to be emulated.
- 6 Requiring the executive mayor to be responsible for the preparation of the annual report, as is the case in the City of Cape Town, other than merely requiring the executive mayor to table it is also commendable. Allocating that responsibility to the executive mayor ensures that he or she is actively involved in the preparation process.

4 RECOMMENDATIONS

Having made the assessment and findings as well as outlining the best practices, recommendations will be made. The recommendations are made in line with the focus of the study on separation of powers and oversight. The argument that purposeful use of mechanisms in legislation may translate into significant separation of powers and enhanced oversight guides the direction of the recommendations. The recommendations are outlined below.

1. In terms of the legal framework, it is recommended that the current constitutional design, entrusting both executive and legislative authority in the council of a municipality be maintained. The focus of the municipalities should rather be on the proper and purposeful use of the legislative mechanisms available to segregate the executive functions from the council and to improve oversight.

2. Municipalities should consider following the comprehensive and combined systems in drawing up the terms of reference and systems of delegation.²²⁸ The terms of reference and delegations of a particular office bearer or structure have to be laid down in a single document and all the terms of reference and delegation compiled in a comprehensive system of delegations. This is recommended as it ensures easy accessibility of all terms of reference and delegations.
3. It is recommended that municipalities adopt systems of governance separating functions of the executive from functions of the council. This may loosely be referred to as a separation of functions instead of the separation of powers. It is not correct to state or attempt to have separation of powers at municipal level within the current constitutional and legislative framework. The result would be contradictory to the prescription of the Constitution and legislation. What should be encouraged is the separate status and functioning of the executive from the council, subject to the provisions of the Constitution and legislation.
4. Further to recommendation number (2) above, when allocating roles and responsibilities in the terms of reference or the delegations, municipalities need to make sure that the powers and functions of office bearers and structures should be designed in such a way that a significant segregation or separation between functions that are executive in nature and functions that are legislative.
5. It is recommended that the municipalities have to clearly spell out the relationship between the speaker and the executive mayor as well as clarify on the overall authority of the municipality's affairs.
6. It is recommended that an express provision indicating who has the overall responsibility to direct and oversee the administration between the speaker and the

²²⁸ See section 4.2.1 above.

executive mayor be introduced. This express provision may either be inserted in legislation or the municipalities may deal with it in that manner in the terms of reference and delegations. This is necessary to clear out the uncertainty that exists due to the conflating of powers in the council. It is suggested that the administration be the responsibility of the executive mayor because administrative functions are closely related to execution and implementation of municipal programs. Further, according to legislation the executive mayor has oversight powers over municipal management.²²⁹

7. Capacity building measures for councillors in respect of scrutiny and oversight are recommended in an effort to deal with the lack of meaningful engagement when reports are presented in the council or committees. In relation to the reports envisaged by section 71 and 72 of MFMA, guidelines aimed at improving the quality of debate and deliberations.
8. In the case of executive mayoral or collective municipal systems, specific guidelines need to be put in place outlining the instances where the council may exercise executive functions to ensure that the practice of segregating executive functions from the council is maintained. It is recommended that the power of the council to perform executive functions should be exercised with caution, although the executive powers are vested in the council by the Constitution. This recommendation can be applied through legislation. The national government can do that through its authority to regulate the exercise of executive functions of municipalities under section 151(3) and 155(7) of the Constitution.
9. Apart from what is recommended in 8 above, it is recommended that the courts should also adopt an approach that allows municipal executive to exercise executive authority without being eclipsed by the council. The council should be allowed to

²²⁹S 56(3)(d) Structures Act.

exercise executive authority itself in specific circumstances. Only when such approach is advanced can a meaningful segregation or separation of powers and functions be attained.

10. It is recommended that section 79 committees should not be allocated responsibility of initiating policy or by-laws. Such responsibility should be the domain of the executive office bearers and structures. The responsibility to initiate policy or by-laws is an executive function and allocating the same to section 79 committees may compromise the ability of the section 79 committees to provide the requisite scrutiny and checks on the executive.

It is believed that the implementation of the above recommendations will help national policy makers, the provincial government and the municipalities instil municipal systems of governance separating the executive functions from legislative functions, with meaningful oversight over the executive. In the long run, better and efficient governance should result. It is expected that with such better governance that ensure checks and balances and accountability, it will lead to better service delivery by municipalities.

Word Count (Chapters and Footnotes)

20 215



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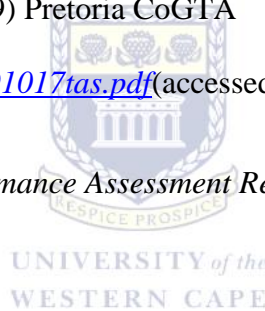
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