

**GOOD GOVERNANCE IN STATE INSTITUTIONS SUPPORTING SOUTH
AFRICA's SYSTEM OF MULTI-LEVEL GOVERNMENT**

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Multi-Level Government

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Municipal Demarcation Board

South African Heritage Resources Agency

Good Governance

Effective Leadership

Administrative Harmony

Economical and Efficient Use of Resources

Mandate Execution

Efficient and Effective



DECLARATION

I, Mmatlou Phinah Ramela, declare that 'good governance in state institutions supporting South Africa's system of multi-level government' is my own work and that it has not been submitted before for any degree or examination in any other University, and that all sources I have used or quoted have been indicated and acknowledged as complete references.

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LIST OF ABBREVIATIONS

AGSA	Auditor General South Africa
CEO	Chief Executive Officer
FFC	Financial and Fiscal Commission
IEC	Independent Electoral Commission
MDB	Municipal Demarcation Board
MEC	Member of the Executive Council
MLG	Multi-level government
NEPAD	New Partnership for Africa's Development
PCAC	Portfolio Committee on Arts and culture
PHRAs	Provincial Heritage Resources Authorities
SAHRA	South African Heritage Resources Agency
SCOPA	Standing Committee on Public Accounts



CHAPTER 1: INTRODUCTION

1. PROBLEM STATEMENT

At the advent of democracy in South Africa, the framers of the Constitution of the Republic of South Africa Act 200 of 1993 (Interim Constitution), introduced a multi-level government¹ (MLG) system. The MLG system² is found in the Constitution of the Republic of South Africa, 1996 (Constitution). The MLG system created three spheres of government³ with constitutionally assigned competences, as a response to internal pressure to decentralise power.⁴ The goal of the MLG system was to improve service delivery through the three spheres of government. In addition to the three spheres of government, the Constitution and various laws provided for independent state institutions that were meant to support the functioning of the MLG system.

Whereas, there are a number of state institutions facilitating or assisting the MLG system, this paper focuses on the Financial and Fiscal Commission (FFC), the Municipal Demarcation Board (MDB) and the South African Heritage Resources Agency (SAHRA). It evaluates their internal organisation and functioning to see whether they positively contribute to or impede the objectives of the MLG system.

The FFC is an independent⁵ constitutional advisory body mandated with advising and making recommendations to Parliament, Provincial Legislatures, organised local government and other Organs of State on financial and fiscal matters. Thus, the FFC is a key institution in intergovernmental fiscal relations.⁶

¹ Constitutional Element XVI.

² Section 40 (1) Constitution.

³ Kohler-Koch B and Rittberger B 'Review article: the governance turn in EU studies' (2006) 44 *Journal of Common Market Studies* 34.

⁴ Peters BG and Pierre J 'Developments in intergovernmental relations: towards multi-level governance' (2001) 29 *Policy and Politics* 134 and Stephenson P 'Twenty years of multi-level governance: where does it come from? what is it? where is it going?' (2013) 20 *Journal of European Public Policy* 828.

⁵ Section 220 (2) Constitution.

⁶ What is the FFC? <http://www.ffc.co.za/index.php/about-ffc/what-is-the-ffc> (accessed 20/11/2013).

The MDB is an independent, constitutional executive authority responsible for determining and re-determining municipal boundaries, delimiting wards for local government elections and assessing the capacity of municipalities to perform their functions.⁷ Thus, the MDB's decisions affect the local, the provincial and the national spheres of government.

SAHRA is a statutory organisation established under the National Heritage Resources Act 25 of 1999 (NHRA), as the national administrative body responsible for the protection of South Africa's cultural heritage. It is a public entity in terms of Schedule 3A of the Public Finance Management Act 1 of 1999 (PFMA). The Agency's functions include advising, assisting and providing professional expertise to any authority responsible for the management of the national estate at provincial and local levels.⁸ Therefore, the effectiveness and efficiency of provincial and local heritage authorities is linked to the functionality of the SAHRA.

The first two deal with intergovernmental relations directly, the latter does not. While the first two directly deal with the MLG system, the latter facilitates the functioning of MLG within the Arts and culture sector. Whereas SAHRA is not a direct intergovernmental relations institution, it illustrates how a malfunctioning national body can adversely affect other heritage institutions from provincial and local government whose functioning depends on the Agency.

It is crucial that state institutions are able to execute their own mandate in order for the end goals of the MLG system to be achievable. Generally, from an outsider's perspective, the mandate execution is indicative of an institution's efficiency and effectiveness. Effectiveness is defined as the degree to which objectives are achieved and the extent to which targeted problems are solved. Efficiency is measured by the quality and the time it takes to deliver the products or services. However, there are external and internal factors which are controlled by different drivers that influence attainment of an institution's end

⁷ Sections 155(3)(b) Constitution and 3(b) of the Municipal Demarcation Act 27 of 1998, *Matatiele Municipality and others v President of the Republic of South Africa and others* 2006 (5) SA 47 (CC) paras 39-41, and *Merafong Demarcation Forum and others v President of the Republic of South Africa and others* 2008 (10) BCLR 968 (CC) para 297.

⁸ Section 13(1) NHRA.

goals. The author will assess the effectiveness and efficiency of an institution through the elements of good governance.

Whereas governance refers to processes whereby state institutions exert power and authority, influence and formulate policies, and make decisions concerning public life, economic and social development,⁹ there is no agreement on the definition of good governance. Nevertheless the quality of internal governance is measured based on adherence to the eight elements of good governance from the United Nations.¹⁰ In this study, the author groups the elements of good governance into four themes, which are further evaluated using indicators.¹¹ The four themes are effective leadership, the administrative harmony,¹² the economical and efficient use of resources¹³ and the mandate execution or service delivery as outlined in the Constitution and enabling legislation.¹⁴

The ability to execute an institutional mandate is dependent on effective leadership which is in a harmonious relationship with its implementing body as led by the Chief Executive Officer (CEO). Generally, one has to look at the product or service delivered in order to find out the state of governance in an institution. The delivery of a poor product is a reflection of poor internal governance¹⁵ which manifests itself in ills such as financial mismanagement and official corruption that frustrate development goals.¹⁶

⁹ Ferreira-Snyman MP and Ferreira GM 'Global good governance and good global governance' (2006) 31 *SAYIL* 54-55.

¹⁰ What is good governance? United Nations Economic and Social Commission for Asia and the Pacific <http://www.unescap.org/pdd/prs/ProjectActivities/Ongoing/gg/governance.asp> (accessed 20/11/2013).

¹¹ Institute on governance *Principles of good governance in the 21st century* (2003) Policy Brief No 15, Ottawa, Canada 3.

¹² Section 195 (1) (h) Constitution.

¹³ Section 195 (1) (b) Constitution.

¹⁴ Section 1(c) Constitution.

¹⁵ Owoye O and Bissessar N 'Bad governance and corruption in Africa: symptoms of leadership and institutional failure' <http://www.ameppa.org/upload/Bad%20Governance.pdf> (accessed 20/11/2013), Kanyam DA 'Bad governance the bane of Africa's underdevelopment' *Modern Ghana* 31/10/2009 <http://www.modernghana.com/news/246630/1/bad-governance-the-bane-of-africas-underdevelopmen.html> (accessed 20/11/2013) and Ologbenla DK 'Leadership, governance and corruption in Nigeria' (2007) 9 *Journal of Sustainable Development in Africa* 97-98.

The leadership, as the decision-making body, influences the institution's state of affairs, through its internal governance. As the controlling structure in an institution, the leadership must ensure that resources are used economically and efficiently in the execution of the mandate.¹⁷ The decisions made by the leadership must be implemented by the CEO who heads the implementing body. For a good product or service to be delivered in time, the Board and CEO must work together in harmony. This harmonious relationship should lead to a clean audit, which is indicative of sound internal governance. A clean audit means that an institution's financial statements are free from material misstatements; there are no negative findings on reported performance objectives and compliance with legislation.¹⁸ A clean audit outcome indicates that the institution uses its resources economically and efficiently.

However, there have been varied reports about poor internal governance in state institutions. A large number of state institutions are said to be dysfunctional and poorly governed.¹⁹ This is attributed to external factors such as political interference²⁰ and internal factors such as corruption,²¹ conflict between the Board and the CEO,²² irregular

¹⁶ Seemela P and Mkhonto X 'Fundamentals of good governance in the public sector' (2007) 42 *Journal of Public Administration* 208.

¹⁷ Day C 'Effective leadership and reflective practice' (2000) 1 *Reflective Practice: International and Multidisciplinary Perspectives* 113.

¹⁸ Audit terminology <http://www.agsa.co.za/Auditinformation/Auditterminology.aspx> (accessed 20/11/2013).

¹⁹ Presidential Review Committee *State-owned entities volume 2 main report* <http://www.polity.org.za/article/report-of-the-Presidential-review-Committee-on-state-owned-entities-may-2013-2013-05-29> (accessed 20/11/2013) and Parliament of the Republic of South Africa *Report of the Ad Hoc Committee on the review of Chapter 9 and associated institutions* (2007) A report to the National Assembly of the Parliament of South Africa, Cape Town, South Africa http://www.Parliament.gov.za/content/Chapter_9_report.pdf (accessed 20/11/2013).

²⁰ Duncan J 'SABC crises serve the interests of power elite' *Sunday Times* 25/03/2013 <http://www.ru.ac.za/highwayafrica/articles/name,80191,en.html> (accessed 20/11/2013) and Skinner K 'Critical SABC needed' *Sunday World* 24/03/2013 <http://www.sundayworld.co.za/talk/2013/03/24/critical-sabc-needed> (accessed 20/11/2013).

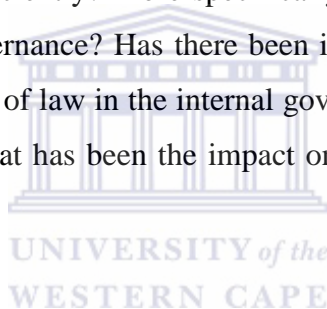
²¹ ENCA 'NYDA's future on the agenda at the state of the nation address' *ENCA* 14/02/2013 <http://www.enca.com/south-africa/nydas-future-agenda-state-nation-address> (accessed 20/11/2013).

expenditure,²³ vacuum in leadership²⁴ and boardroom tussles. It is apparent that the good governance requirements of the Constitution are not always adhered to. The consequences have been an inability to deliver good services or products. This undermines the integrity, public confidence and effective service delivery in the system of governance.²⁵

This raises the question whether the three independent institutions also fall into this category of dysfunctional state institutions, thus impacting negatively on the MLG system.

2. RESEARCH QUESTION

This research paper seeks to answer the question of whether the FFC, the MDB and the SAHRA have assisted and facilitated the MLG system. Have they performed their functions effectively and efficiently? More specifically, have they functioned according to the elements of good governance? Has there been internal stability, financial probity, and compliance with the rule of law in the internal governance of the FFC, the MDB and the SAHRA? And if not, what has been the impact on the functioning of the system of MLG?



3. ARGUMENT

The FFC has assisted the MLG system through its execution of its mandate. The MDB has executed its constitutional mandate but not the statutory mandate and SAHRA has not executed its mandate.

²² Skinner K 'Critical SABC needed' *Sunday World* 24/03/2013

<http://www.sundayworld.co.za/talk/2013/03/24/critical-sabc-needed> (accessed 20/11/2013).

²³ Meeting of the Portfolio Committee: women on the Commission on gender equality strategic Plan 2013/14 briefing 05/06/2013 <http://www.pmg.org.za/report/20130605-Commission-gender-equality-strategic-plan-201314-content-advisor-researchers-briefing> (accessed 20/11/2013).

²⁴ Meeting of the Ad Hoc Committee on the review of the Chapter 9 and associated institutions supporting constitutional democracy 02/03/2007 <http://www.pmg.org.za/minutes/20070301-Commission-gender-equality-hearing> (accessed 20/11/2013).

²⁵ Edwards T 'Ethical fitness for accountable public officials: an imperative for good governance' (2007) 42 *Journal of Public Administration* 29.

Both FFC and MDB have functioned reasonably well according to the elements of good governance, while SAHRA has not functioned effectively and efficiently. All three institutions have had problems which could jeopardise their internal governance, functionality and stability.

4. LITERATURE SURVEY

The available literature has much written about good governance, but very little about the functioning of state institutions and the three institutions under discussion.

Several approaches have been followed in assessing good governance. Mpehle and Qwabe use an outcome-based governance approach in product delivery focusing on performance auditing for compliance with accountability in local government.²⁶ Similarly Van der Nest et al looks at accountability of audit Committees as it affects the PFMA.²⁷

Fourie explores the use of performance management where he defines performance elements for effective governance and performance management in the public sector.²⁸ He agrees that good governance reflects the effective and efficient use of resources by management, but falls short of assessing the delivery of product and services.²⁹ Naidoo and Dorasamy argue that good governance depends on ethical leadership, and direct their findings at leaders in their private capacity.³⁰

²⁶ Mpehle Z and Qwabe B 'Performance auditing as means to entrench professional ethos in the public sector: a South African local government perspective' (2008) 43 *Journal of Public Administration* 255-256.

²⁷ Van der Nest DP, Thornhill C and De Jager J 'Audit Committees and accountability in the South African public sector' (2008) 43 *Journal of Public Administration* 545-558.

²⁸ Fourie DJ 'The use of performance management for effective governance in public administration' (2012) 20 *Administratio Publica* 124-138.

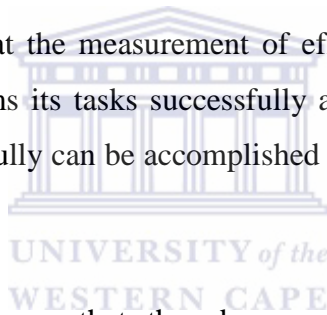
²⁹ Fourie D 'Institutional mechanisms and good governance: a perspective on the South African public sector' (2009) 44 *Journal of Public Administration* 1114-1123.

³⁰ Naidoo G 'Ethical leadership elements in South African public administration lost opportunity or alive with possibility' (2012) 3 *Mediterranean Journal of Social Sciences* 106-126 and Dorasamy N 'The impact of the global crisis on ethical leadership: a case study of the South African public sector' (2010) 4 *African Journal of Business Management* 2087-2096.

Generally, literature on governance caters for elements that could assist in identifying weaknesses, but the link between the weaknesses in governance and product delivery is not addressed.

Cameron calls for a redefining of the political–administrative relationships. He reasons that the politicisation of the public service has contributed to poor service delivery.³¹ Kuye and Mafunisa state that good leadership is ethical leadership. They define good leadership as the element of dynamic force that coordinates the organisation in the accomplishment of its objectives.³² They are of the opinion that the convergence of public duty with private interest has been the cause of unethical conduct. They assert that the performance of any organisation is directly related to the quality of its leadership. Thus, effective leaders will lead their institutions to greater heights of achievement, productivity and ultimately prosperity.³³

Kuye and Mafunisa state that the measurement of effective leadership is the extent to which the institution performs its tasks successfully and attains its objectives. Meeting tasks and objectives successfully can be accomplished within the template of an effective governance infrastructure.³⁴



Sindane and Nambalirwa argue that the absence of good governance and public leadership are the silent triggers of service delivery protests.³⁵ However, their assessment is based purely on the reasons for service delivery-related protests in the local government sphere. Edwards is of the opinion that leadership incapacity and administrative challenges are impediments to ethical fitness in the public sector.³⁶

³¹ Cameron R ‘Redefining political–administrative relationships in South Africa’ (2010) 76 *International Review of Administrative Sciences* 698.

³² Kuye JO and Mafunisa MJ ‘Responsibility, accountability and ethics: the case for public service leadership’ (2003) 38 *Journal of Public Administration* 431.

³³ Kuye JO and Mafunisa MJ (2003): 38 432.

³⁴ Kuye JO and Mafunisa MJ (2003): 38 433.

³⁵ Sindane AM and Nambalirwa S ‘Governance and public leadership: the missing links in service delivery in South Africa’ (2012) 47 *Journal of Public Administration* 702-703.

³⁶ Edwards T (2007):42 30.

Generally, studies on governance have focused on the overall public sector, neglecting independent State institutions supporting government. None of the undertaken studies have tackled the internal governance of the FFC, the MDB and the SAHRA. No one researched the link between effective governance of an institution and the mandate execution.

5. RESEARCH METHODOLOGY

This research paper has relied heavily on documentary evidence, thus it involves the textual analysis of primary and secondary sources. The primary sources are the Constitution, enabling legislation and other publications which refer to the institutions' mandate.

Secondary sources such as writings from scholars have been used. Empirical data drawn from the institutions' annual reports, the Auditor General of South Africa's (AGSA) reports, public documents such as minutes and/or agenda (Parliamentary and institutional) have been examined.

Both print and online media have been used, and views expressed in the newspaper articles have been taken to represent the perspectives of the person quoted in them. It also involve the reviewing and studying of key legal instruments applicable to good governance such as the King reports on corporate governance and the PFMA. The internet has been used for comparative analysis and for researching international standards.

6. STRUCTURE OF THE RESEARCH PAPER

Chapter 2 elaborates on the four themes of good governance against which the performance of the three institutions is measured.

Chapter 3 then focuses on internal governance of the FFC. It examines the role, structure and functions set out by the Constitution and enabling legislation followed by an assessment of its performance.

Chapter 4 covers governance of the MDB by examining its role, structure and functions as set out by the Constitution and enabling legislation followed by an assessment of its performance.

Chapter 5 looks at governance of the SAHRA, examining its legislative role, structure and functions and making an assessment of its performance.

Chapter 6 completes the study with conclusions and recommendations.



CHAPTER 2: GOOD GOVERNANCE

1. INTRODUCTION

This Chapter focuses on the framework and concept of good governance. The value systems which will be assessed for good governance in subsequent Chapters are discussed. The formal policies and principles outlining what is understood by the value systems under the four themes: effective leadership, administrative harmony, economical and efficient use of resources and mandate execution are outlined.

In respect to this study, good governance should be understood as a machine with four themes. Each theme ought to function optimally on its own, and also with others. Each theme's ability to function is influenced by other themes.

Even though this study evaluates the four themes of good governance within the context of a state institution's internal function, external factors such as institutional designers, society and the environment are mentioned for the sake of clarity. Internal functioning in a state institution cannot be isolated from external factors.

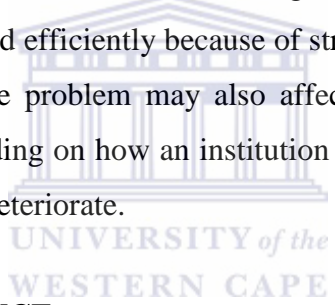
Nzewi contends that the relationship between leadership and institutional effectiveness is related to the intentions of the institution designers who establish them.³⁷ Burger is of the opinion that the environment and society nourishes the cycle of good governance as shown in figure 1 below. Thus, if society allows an institutional environment which is not conducive to the eradication of corruption or maladministration to exist, then the state institution will automatically feed off that environment as created by society.

³⁷ Nzewi O 'Governance and regional institutions: exploring designers' intentions' (2011)
46 *Journal of Public Administration* 697.



Figure 1: The influence of external factors on good governance. Source: Burger J (2006).³⁸

In short, an institution's ability to adhere to elements of good governance is dependent on, and influenced by both external and internal factors. An institutional designer provides a conducive environment by structurally designing the institution correctly, in order for it to be able to adhere to the elements of good governance. If the institution is not functioning effectively and efficiently because of structural design, which can only be corrected externally, then the problem may also affect the internal governance of the institution. Therefore, depending on how an institution is designed, the elements of good governance may flourish or deteriorate.



2. GOOD GOVERNANCE

2.1 The universally accepted elements of good governance

Initially the concept of good governance was invented by donor funders, such as the World Bank, to be used as borrowing conditions for developing countries which lacked sustainable economic growth. However there is a universal agreement that for governance system to be labelled as good it must adhere to eight major elements. It must be participatory; consensus orientated; accountable; transparent; responsive; effective and

³⁸ Burger J *Transform, perform ... or just conform? evaluating SA public management reform initiatives* Inaugural lecture delivered on 25 April 2006, School of public management and planning, Stellenbosch University 7.

efficient; equitable and inclusive; and follow the rule of law.³⁹ Terms such as failed institutions have been used to describe institutions that do not adhere to the elements.⁴⁰

In recent years, the significance of the concept of good governance has grown, and various approaches have been created, in order to streamline the concept to achieve the aims and mandate of the driving institutions.

The social approach emphasises that good governance involves ideas and values about how a state should act towards individuals.⁴¹ Thus, good governance should be promoted with the aim of establishing a legal order in which societal development can thrive, focusing on human rights and the rule of law. By conforming to good governance elements, there is a belief that an institution will be effective in developing the society, and ultimately enhance the fundamental freedom and rights of citizens.

Of recent, the application of good governance varies and depends on the context and the nature, aim and mandate of the driving institution. It is said that the approach can be modified on a need basis, taking into account the environment in which an institution functions.⁴²

The development of good governance has shifted its focus from effectiveness to legality,⁴³ because even an authoritarian government can be extremely effective in controlling a particular territory while blatantly ignoring all or most of the elements constituting good governance. However, since good governance is anchored in law, adherence begins with directors and management discharging their legal duties.⁴⁴

³⁹ What is good governance? United Nations Economic and Social Commission for Asia and the Pacific <http://www.unescap.org/pdd/prs/ProjectActivities/Ongoing/gg/governance.asp> (accessed 20/11/2013).

⁴⁰ Ferreira GM 'Good governance and the failed state' (2008) XLI *CILSA* 442-444.

⁴¹ De la Harpe S, Rijken C and Roos R 'Good governance' (2008) 2 *PER* 4.

⁴² Institute on governance *Principles of good governance in the 21st century* (2003) Policy Brief No 15, Ottawa, Canada 3.

⁴³ Ferreira GM (2008): XLI 442-444.

⁴⁴ Khoza RJ and Adam M *The Power of governance: enhancing the performance of state-owned enterprises* (2005) 28.

The partnership agreement between the members of the African, Caribbean and Pacific group of States and the European community and its member States, of which South Africa is a member, requires that an institutional environment should be conducive to the promotion of good governance. This is indicative of the fact that certain values and principles must be upheld before the environment can accommodate the application of elements of good governance.

In the context of an institutional environment that upholds human rights, democratic principles and the rule of law, good governance is the transparent and accountable management of human, natural, economic and financial resources for the purposes of equitable and sustainable development. It entails clear decision-making procedures at the level of public authorities, transparent and accountable institutions, the primacy of law in the management and distribution of resources and capacity building for elaborating and implementing measures aiming, in particular, at preventing and combatting corruption.⁴⁵

2.2 The new partnership for Africa's development

The new partnership for Africa's development (NEPAD) is a strategic framework of the African Union, aimed at addressing the challenges of poverty and development in Africa. South Africa is a member state of the African Union and a founding member of NEPAD.⁴⁶

Part of the work of NEPAD includes a non-conditional African peer review mechanism performed on member states of the African Union, to promote and re-enforce high standards of governance. The peer review is a self-monitoring mechanism focusing on the promotion of democracy and good governance.⁴⁷

⁴⁵ Ferreira GM (2008): XLI 442-444.

⁴⁶ Founding member countries of NEPAD included South Africa, Nigeria, Algeria, Egypt and Senegal. NEPAD was adopted by African heads of state and government of the OAU in 2001 and was ratified by the African Union in 2002 About NEPAD <http://www.nepad.org/about> (accessed 20/11/2013).

⁴⁷ About NEPAD (accessed 20/11/2013).

2.3 The Constitution

In addition to its principles and values, the Constitution directs that within public administration a culture of good governance⁴⁸ should be promoted by adhering to elements such as:

- a high standard of professional ethics must be promoted and maintained,
- efficient, economical and effective use of resources must be promoted,
- people's needs must be responded to,
- public administration must be accountable,
- transparency must be fostered by providing the public with timely, accessible and accurate information, and
- good human-resource management/administrative harmony must be cultivated.

2.4 King codes on good governance

The various King reports and codes of good governance principles are aimed at promoting good corporate governance. Although the King codes are not legislation, it is declared that King III applies to all entities regardless of the manner and form of incorporation or establishment and whether in the public, private sectors or non-profit sectors.⁴⁹ The principles in the reports are drafted so that even state institutions can apply them and, in doing so, achieve good governance.⁵⁰ Hendricks and Wyngaard are of the opinion that any failure to meet a recognised standard of governance, even though not a legislated standard, may render a Board or individual member liable at law.⁵¹

After the environment has been laid down by external factors such as the executive authorities, through structurally designing the institution to be able to absorb the elements of good governance, it then becomes a function of three things; direction and leadership, risk management and control, and accountability and reporting⁵² to ensure the effectiveness and efficiency of the institution.

⁴⁸ Section 195 (1) Constitution.

⁴⁹ Hendricks PSA and Wyngaard RG 'South Africa's King III: a commercial governance code determining standards of conduct for civil society organizations' (2010) 12 *The International Journal of Not-for-Profit Law* 104.

⁵⁰ Hendricks PSA and Wyngaard RG (2010):12 104.

⁵¹ Khoza RJ and Adam M (2005) 28.

⁵² Khoza RJ and Adam M (2005) 33.

Direction and leadership refer to the quality of the organisation's strategy, the calibre of the CEO charged with developing and implementing the strategy, and the calibre of the Board charged with supervision and overseeing. Risk management and control refer to the processes in place to identify, evaluate and monitor and control risks associated with the successful delivery of strategic and operational objectives which ensure sustainability.

Accountability and reporting refer to adherence to the provision of a true, fair, and accurate account of the stewardship of the enterprise, in a transparent manner, to those with a legitimate interest.⁵³ Good governance is essentially about leadership for efficiency, leadership for probity, leadership with responsibility, and leadership that is both transparent and accountable.⁵⁴



⁵³ Khoza RJ and Adam M (2005) 33.

⁵⁴ Institute of directors in Southern Africa *King report II on corporate governance for South Africa* (2002) South Africa 19.

3. THEMES OF GOOD GOVERNANCE

The four themes of good governance, with each having indicators will be used to assess good governance by using the various sources mentioned in table 1 below.

Table 1: Themes, indicators and sources of good governance

Value system	Indicators	Sources
Effective leadership	Productive relationship between the Board members Vacant positions Acting positions	Parliamentary proceedings and reports, annual reports, AGSA's reports, media reports and the internet
The administrative harmony	Productive relationship between the Board members and the CEO	Parliamentary proceedings and reports, media reports and the internet
Economical and efficient use of resources	The state of financial statements (clean audit, unqualified audit, qualified audit, adverse audit or disclaimer of audit)	Annual reports, AGSA's reports, media reports and the internet
Mandate execution and product or service delivery	The submission of recommendations and delivery of decisions on time	Annual reports indicating submission of recommendations and outlining decisions made by three institutions

The value systems indicated in table 1 above, are examined in order to find out if the four themes are connected, as shown in figure 2 below. The idea behind figure 2 is that if external and internal factors, which are further reduced to four themes are connected, then the institution will be in a position to assist or facilitate the MLG system, thus functioning within the elements of good governance. Where there is dis-connect of figure 2, then the institution will not be functioning effectively and efficiently.

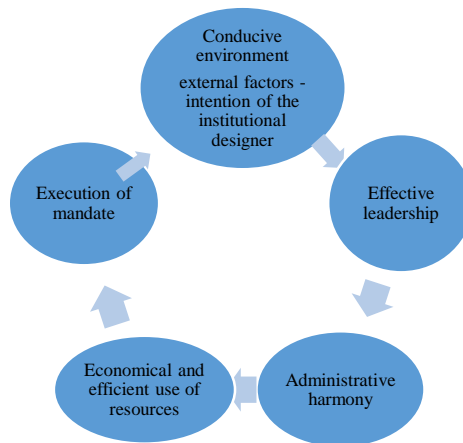


Figure 2: Institutional flow graph showing how the themes of good governance feed each other.

3.1 Effective leadership

Whereas there are personal traits that distinguish leaders from the rest, effective leadership is judged by a leader's ability to deliver products or services. In state institutions an effective leadership provides higher quality and more efficient goods and services.⁵⁵ Effective leadership minimises cases of corruption, unauthorised, irregular, fruitless and wasteful expenditure, is responsive to the target market, which manifests itself in the execution of the institutional mandate. Thus, an effective leader leads an institution to flourish in delivering services and products.⁵⁶

As indicated by figure 3 below, the sophisticated technical management reforms are without effect as long as an organisational culture of poor tactical content is maintained.⁵⁷ What is required is a linkage between effective leadership and administrative harmony in order to execute the institution's mandate, which is further elaborated on below.

⁵⁵ Van Wart M 'Public sector leadership theory: an assessment' (2003) 63 *Public Administration Review* 214.

⁵⁶ Boseman G 'Effective leadership in a changing world' (2008) *Journal of Financial Service Professionals* 36.

⁵⁷ Burger J (2006) 16.

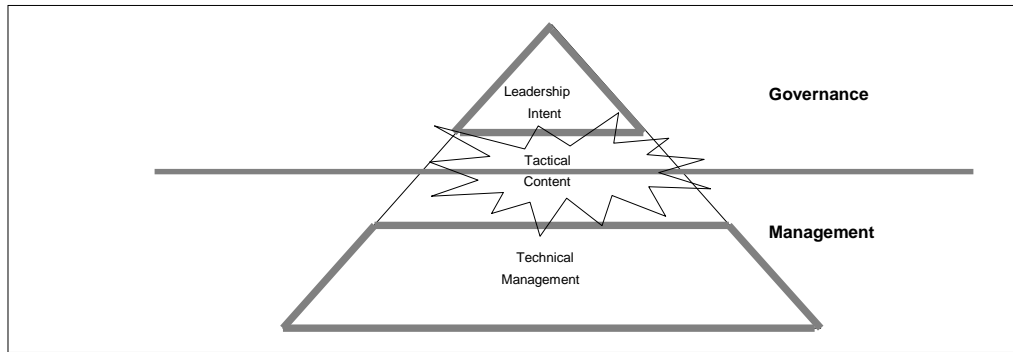


Figure 3: How the relationship between effective leadership and administrative harmony affects the mandate execution. Source: Burger J (2006).⁵⁸

What Burger means is that without effective leadership which is in a harmonious relationship with its CEO, the mandate execution is impossible. The administrative harmony aspect is evaluated below. The lack of delivery is ascribed to poor capacity in the fields of technical skills but even the extended application of these worthy management skills will not correct service delivery shortcomings as long as the tactical governance gap between leadership intent and managed operations remains.

The mandate execution and/or objectives is a collective effort by all appointed leaders. Where there is a pattern of non-performance, non-willingness and lack of acknowledgement of consequences from a leader it can easily be copied by subordinates, to the detriment of the institution. The responsibilities of leadership must be understood with an emphasis on co-operation and solidarity.⁵⁹ Unity amongst the leaders and collective decision-making for the good of the institution⁶⁰ should resonate in an institution. Ineffective and unethical leadership is an impediment to good governance.⁶¹ Effective leaders have a sense of responsibility, moral courage, judgement and integrity.⁶² Most importantly, the decisions made by a leader must nurture the collective spirit of the institution for the good of its long-term health.⁶³

⁵⁸ Burger J (2006) 16.

⁵⁹ Khoza RJ and Adam M (2005) 54.

⁶⁰ Khoza RJ and Adam M (2005) 55.

⁶¹ Pillay S 'Corruption – the challenge to good governance: an SA perspective' (2004) 17 *The International Journal of Public Sector Management* 587.

⁶² Adair J *Action-centred leadership* (1973) 5.

⁶³ Harris P, Berendt CJ, Malindretos IN, Scoullis M and Williams R 'Attributes of effective leadership' (2012) 5 *Advances in Management* 32.

Through the example they set and the quality of decisions they make, leaders influence those under them to make judgements according to similar criteria.⁶⁴ Therefore an effective leader ought to have a combination of traits and appropriate knowledge, expertise and skills related to the functional field in which she works.⁶⁵

3.1.1 Vacant leadership positions

The majority of studies have indicated that a vacant leadership position puts a strain on the effectiveness of an institution. Institutional performance has been shown to be at its lowest when there is an absence of a person giving direction.⁶⁶ The author will assess vacant leadership positions within the three institutions and its implications on the institutions' execution of mandate.

3.1.2 Acting leadership positions

The question to be asked is how effective can a person in an acting position be when compared to a permanent leader? Generally, an acting person is occupying a position while there is still a search for a permanent leader, who is capable of fulfilling the task at hand, and therefore there is an assumption that the acting leader is incapable of performing the role.

On a personal level, the person temporarily in a leadership position is likely to find a secure job somewhere else, to the detriment of the institution. Secure employment is crucial for one's personal development and stability. An acting leader may feel inadequately empowered⁶⁷ and might consider leaving the institution. Empowerment to make decisions may be unduly influenced by the external authority, something which might not so readily occur with a permanent leader.

⁶⁴ Du Toit DFP, Van Der Waldt G, Bayat MS and Cheminais J *Public administration and Management for effective governance* (1998) 122.

⁶⁵ Du Toit et al *Public Administration and management for effective governance* (1998) 185.

⁶⁶ Khurana R and Nohria N 'The performance consequences of CEO turnover' (2000) <http://dx.doi.org/10.2139/ssrn.219129> (accessed 20/11/2013).

⁶⁷ Billowitz A and Silverman JJ 'The interim chairman role' (1989) 16 *Administration and Policy in mental health* 157.

3.1.3 Productive relationship between Board members

Cady and Soukup state that what most often rules good governance in an institution is overcoming the challenges stemming from the personal interactions between Board members.⁶⁸ Factors such as dominant personalities, egos, group factions, mismatch of skills and styles, and an absence of a sense of direction play a major part on the dysfunctionality of an institution. Accordingly, the biggest problem to be overcome is the interpersonal relationships between Board members in order to have an optimally functioning institution.

3.2 Administrative harmony

Good administrative harmony is the backbone of each state institution. Stability within the CEO's office is crucial for the attainment of the institution's objectives as illustrated in figures 2 and 3 above. A non-harmonious relationship between the Board and the CEO affects the stability and functionality of an institution. The governance of a state institution requires harmony and convergence of the decision-made and the decision-implementation in order to have a positive outcome. It thus requires that the Board and the CEO should be in accord, at all times.

However, the CEO should not also fulfil the role of Chairperson of the Board.⁶⁹ For accountability and transparency, there should be a clear separation of functions of the duties performed by the CEO and the Chairperson. The CEO must be answerable to the Board. The CEO must only make those decisions that have been authorised by the Board, and not usurp functions of the Board. The CEO ought to bring any information that concerns the institution to the Board's knowledge.

3.2.1 Productive relationship between the Board and the CEO

The most important relationship in governance is that between the Board and the CEO. The overall policy of the institution should be formulated and set by the full Board including the CEO, but implemented by the CEO. There should be clear lines of responsibilities, with the Board determining the strategic decisions and the CEO

⁶⁸ Cady JH and Soukup WR 'The ugly truth about Board relations' (2008) *ABA Banking Journal* 46.

⁶⁹ Principle 2.16 King report III.

developing various strategies to achieve the company's main objectives.⁷⁰ Monitoring and oversight should be tasked to the Board.

The CEO is authorised to establish all further policies, make all decisions, take all actions, and develop all activities as long as they are consistent with any reasonable interpretation of the Board's policies.⁷¹ Because of the nature of the duties performed by the Board and the CEO, and for accountability and clear reporting lines, policy-makers should not at the same time be the implementers of the policy. Such dualism goes against the principles of separation of powers. A primary function of the Board is to monitor the CEO, which is impeded when the Chairperson of the Board also serves as the CEO.⁷² There should be clear definition and separation of the roles and responsibilities of the Chairperson and the CEO to ensure that there is no friction.⁷³

3.3 Economical and efficient use of resources

To promote accountability and transparency, an institution's use of allocated resources is scrutinised and monitored by the AGSA, in order to assess whether the allocated resources are used as intended. The auditing of an institution's financial statements is completed in order to ensure efficiency and economical use of public resources.

3.3.1 The state of financial statements

The AGSA's audit is expressed as an opinion based on findings. It is regarded as a clean audit when a state institution's financial statements are free from material misstatements. They are free from material misstatements when there are no negative findings on reported performance objectives and compliance with legislation.⁷⁴ On the contrary, an unqualified audit with findings is one with negative outcomes reported on predetermined objectives or compliance with legislation, or both these aspects.

⁷⁰ Khoza RJ and Adam M (2005) 62.

⁷¹ Laughlin FL and Andringa RC *Good governance for non-profits: developing principles and policies for an effective Board* (2007) 121.

⁷² Daily CM 'The relationship between Board composition and leadership structure and bankruptcy reorganisation outcomes' (1995) 21 *Journal of Management* 1046.

⁷³ Patricof AJ, Henderson D, Marcus B, Smale JG and Johnson DW 'Redraw the line between the Board and the CEO' (1995) 73 *Harvard Business Review* 162.

⁷⁴ Audit terminology <http://www.agsa.co.za/Auditinformation/Auditterminology.aspx> (accessed 20/11/2013).

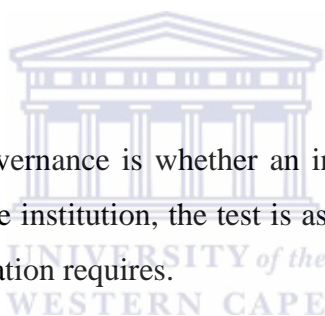
A qualified audit means that the financial statements contain material misstatements in specific amounts, or there is insufficient evidence for the AGSA to conclude that specific amounts included in the financial statements are not materially misstated.⁷⁵

An adverse audit opinion means that the financial statements contain material misstatements that are not confined to specific amounts, or the misstatements represent a substantial portion of the financial statements.⁷⁶

A disclaimer of audit opinion is the worst of all AGSA's opinions, because it means that the state institution provided insufficient evidence in the form of documentation on which to base an audit opinion. The lack of sufficient evidence is not confined to specific amounts, or represents a substantial portion of the information contained in the financial statements.⁷⁷

3.4 Mandate execution

The primary test of good governance is whether an institution executes or performs its mandate. In the case of a state institution, the test is as to whether it provides the service that the Constitution or legislation requires.



4. CONCLUDING REMARKS

Good governance in state institutions enhances the prospects of their fulfilling their constitutional or legislative mandate. Where they deal or are supportive of the MLG system, their proper functioning is essential for the health of the system. Effective leadership is the most important prerequisite for a conducive environment in a state institution. An effective leader, who is the driver, sets the scene for the delivery of product/service on time, by adhering to elements of good governance. It is emphasised that evidence of a well-functioning institution is the resultant product output/delivery of

⁷⁵ Audit terminology <http://www.agsa.co.za/Auditinformation/Auditterminology.aspx> (accessed 20/11/2013).

⁷⁶ Audit terminology <http://www.agsa.co.za/Auditinformation/Auditterminology.aspx> (accessed 20/11/2013).

⁷⁷ Audit terminology <http://www.agsa.co.za/Auditinformation/Auditterminology.aspx> (accessed 20/11/2013).

product/service on time. A link was made between effective leadership, a conducive, harmonious environment, a well- functioning institution, and the resultant product output.



CHAPTER 3: THE FINANCIAL AND FISCAL COMMISSION

1. INTRODUCTION

The Financial and Fiscal Commission (FFC) owes its existence to the Interim Constitution which also provided for decentralisation without express details regarding how it should be achieved.⁷⁸ The Commission's basic functions were outlined in the Interim Constitution with procedures being left to be developed by the Commission itself during its foundation years.

In 1995, the Commission produced the framework document for intergovernmental fiscal relations in South Africa, which contained a set of principles for the intergovernmental fiscal system. The framework document explored how the FFC's role and responsibilities were envisaged in the Interim Constitution and how these may be realised in practice.⁷⁹

This Chapter outlines the FFC's legal framework. This is followed by an assessment of the FFC's leadership's effectiveness, good administrative harmony, the economical and efficient use of resources and execution of mandate.

2. LEGAL FRAMEWORK

The FFC was initially established in terms of Section 198 of the Interim Constitution. However, Section 220(1) and (2) of the Constitution provides for it as an independent Commission, which is subject only to the Constitution and the law, and which must be impartial in the performance of its functions.

Various enabling Acts such as the Financial and Fiscal Commission Act 99 of 1997 (FFCA), which has since been amended by the Financial and Fiscal Commission Amendment Act 25 of 2003, and the Intergovernmental Fiscal Relations Act 97 of 1997 (IFRA), have been enacted to give effect to the constitutional requirements relating to the FFC, and to allow the Commission to perform its functions.

⁷⁸ Melck AV and Gass C 'The role of the FFC within the intergovernmental fiscal relations system in South Africa – evolution, key successes and challenges'

http://www.ffc.co.za/index.php/component/docman/doc_download/155-212-melck-a-v-gass-cthe-role-of-the-ffc-20pp.html (accessed 20/11/2013).

⁷⁹ Melck AV and Gass C (accessed 20/11/2013).

2.1 Governance structure

Initially the Constitution provided for an FFC comprising of twenty-two Commissioners. However, in 2001 a constitutional amendment which took effect in 2004, reduced the number of Commissioners to nine. The FFC Commissioners, who are appointed by the President, consist of a Chairperson, a deputy Chairperson, three persons selected after consulting the Premiers, two persons selected after consulting organised local government, and two other persons.⁸⁰

Presently, only the Chairperson is a full-time employee of the Commission.⁸¹ The Commission must report regularly both to Parliament and to the Provincial Legislatures.⁸²

Section 221(2) of the Constitution requires the Commissioners to have appropriate expertise, which is understood to be expertise in intergovernmental fiscal relations system and matters.⁸³ A Commissioner may be removed from office on grounds of misconduct, incapacity or incompetence.⁸⁴ The remuneration, allowances and other benefits of members of the Commission must be determined by the President, taking into account various factors, including recommendations from other institutions.⁸⁵

The Commissioners are appointed for a term not exceeding five years,⁸⁶ although they are eligible for reappointment. A Commissioner may resign by giving at least three months' written notice, but a shorter notice period in a specific case may be accepted.⁸⁷ An appointment to any vacancy on the Commission must be made not later than ninety days from the date when such vacancy occurs.⁸⁸ The majority of the Commissioners constitute

⁸⁰ Section 221 (1) Constitution.

⁸¹ FFC's annual report 2009-2010 14.

⁸² Section 222 Constitution.

⁸³ Section 221(2) Constitution.

⁸⁴ Section 11(1) FFCA.

⁸⁵ Section 9(1) FFCA.

⁸⁶ Section 8(1) FFCA.

⁸⁷ Section 10 FFCA.

⁸⁸ Section 5(3) FFCA.

a quorum for a meeting of the Commission.⁸⁹ A question before the Commission is decided with a supporting vote of at least two-thirds of the Commissioners present.⁹⁰

2.2 Mandate

The Commission's purpose is to advise and make recommendations to Parliament, Provincial Legislatures, organised local government and other Organs of State on financial and fiscal matters. Broadly, any laws that pertain to or affect intergovernmental fiscal relations⁹¹ must be enacted after sourcing the recommendations of, or consulting the Commission.

In terms of Section 214 of the Constitution, the FFC must be consulted and any of its recommendations considered⁹² in the enactment of an Act of Parliament that provide for (a) the equitable division of revenue raised nationally among the national, provincial and local spheres of government; (b) the determination of each province's equitable share of the provincial share of that revenue; and (c) any other allocations to provinces, local government or municipalities from the national government's share of that revenue, and any conditions on which those allocations may be made.

The FFC's recommendations should be submitted at least ten months⁹³ (or a later date with an agreement between the Minister of finance and the Commission) before the start of each financial year. When the Minister of finance introduces the division of revenue bill, it must be accompanied by a memorandum explaining the extent to which account was taken of any recommendations of the FFC.⁹⁴

In terms of Section 228 of the Constitution, the FFC must be consulted and its recommendations considered⁹⁵ in the enactment of a national legislation regulating

⁸⁹ Section 15(1) FFCA.

⁹⁰ Section 15 (2) FFCA.

⁹¹ What is the FFC? (accessed 20/11/2013).

⁹² Sections 214 (1) and 214 (2) Constitution, Section 9 IFRA, and Section 4 (4)(c) Money Bills Amendment Procedure and Related Matters Act 9 of 2009 (MBAPRMA).

⁹³ Section 9 (1) IFRA.

⁹⁴ Section 10 (5) (b) IFRA.

⁹⁵ Section 228 (2)(b) Constitution and Section 3 Provincial Tax Regulation Process

provincial taxes. Furthermore the municipal fiscal powers and functions⁹⁶ given to municipalities must be regulated by national legislation enacted only after the FFC has been consulted, and its recommendations considered.⁹⁷

National legislation regulating the provinces' ability to raise loans for capital or current expenditure⁹⁸ must be enacted only after any recommendations of the FFC have been considered.⁹⁹ Similarly, Section 230A of the Constitution calls for municipal loans which must be regulated by national legislation enacted only after the Commission's recommendations have been considered.¹⁰⁰

In terms of 218 of the Constitution, an Act of Parliament guaranteeing any government loans may be enacted only after any recommendations of the FFC have been considered.¹⁰¹ In terms of Section 219 of the Constitution, an Act of Parliament in respect of remuneration of persons holding public office may only be passed after considering any recommendations of the FFC.¹⁰²

In addition, the FFC is mandated to submit recommendations for the medium-term expenditure framework (MTEF)¹⁰³ and the appropriations bill¹⁰⁴ as well as recommendations on the fiscal framework and revenue proposals.¹⁰⁵ The Commission must also make financial and fiscal recommendations before any power or function¹⁰⁶ of one sphere is assigned to an Organ of State in another sphere of government.

Act 53 of 2001.

⁹⁶ Section 229 Constitution.

⁹⁷ Section 229 (5) Constitution.

⁹⁸ Section 230 Constitution.

⁹⁹ Section 230 (2) Constitution.

¹⁰⁰ Section 230A (2) Constitution.

¹⁰¹ Section 218 (2) Constitution.

¹⁰² Section 219 (5) Constitution.

¹⁰³ Section 4 (4)(c) MBAPRMA, the IFRA 97 of 1997 and Section 3 (1) of part one of the FFC Amendment Act 25 of 2003.

¹⁰⁴ Section 4 (4) (2) MBAPRMA, and Section 3 FFCA of 1997.

¹⁰⁵ Section 4 (4) (c) MBAPRMA, and the FFCA (1997) as amended.

¹⁰⁶ Section (2A) (a) FFCA, Section 9 of the Municipal Systems Act 32 of 2000, and Section 3 FFCA.

Therefore, the Commission's functions are twofold: submission of recommendations and documents on a periodic basis, and provision of comments and advices on financial and fiscal policy issues on demand or request.

3. EFFECTIVE LEADERSHIP

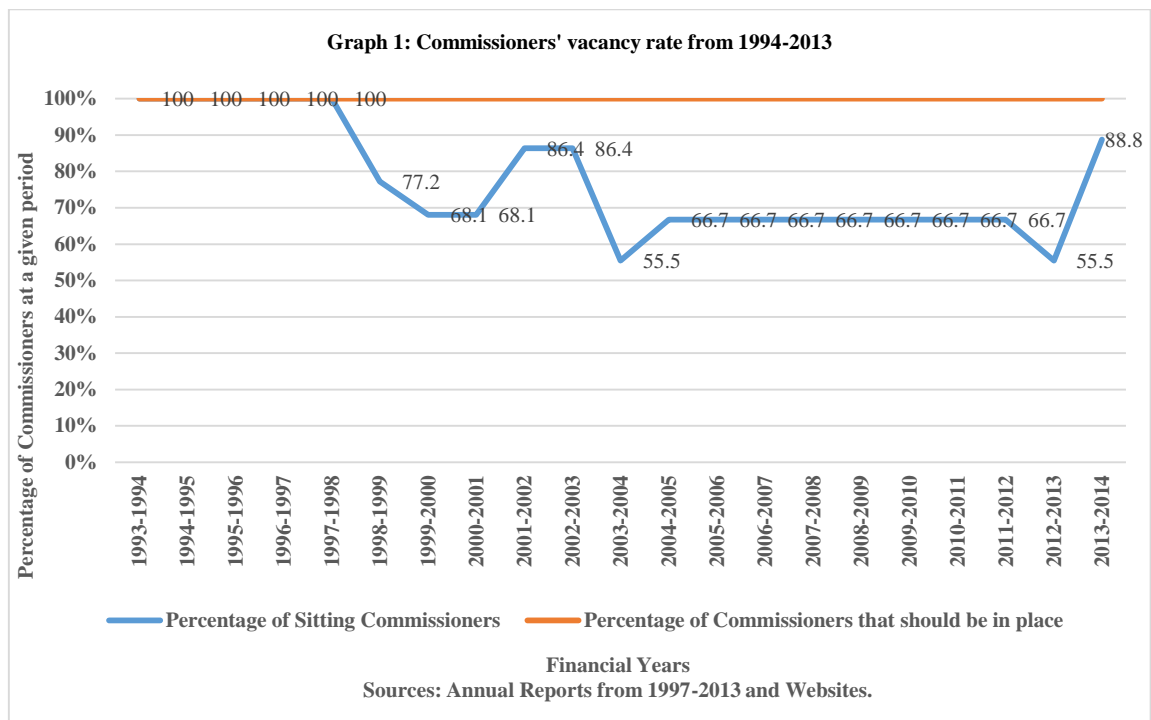
Effectiveness requires that the right Commissioners are appointed in order to meet the targets or execute the mandate. In respect to the FFC, effectiveness requires having Commissioners with expertise in intergovernmental fiscal relations. A Commissioners' meeting would not be properly constituted unless there is a quorum.¹⁰⁷ Furthermore, a question before the Commission must be decided with a supporting vote of at least two thirds of the Commissioners' present.¹⁰⁸

3.1 Vacant Commissioners' positions

Although the law provides for a specific number of Commissioners, there have been periods or years when there have been vacancies in a number of positions, thereby affecting the effectiveness of the Commission. Graph 1 below shows the percentage of Commissioners in office for each financial year. The vertical axis represents the percentage of sitting Commissioners and the horizontal axis represents the financial years. The percentage of sitting Commissioners is indicated by the thick blue line across the graph.

¹⁰⁷ Section 15 (1) FFCA.

¹⁰⁸ Section 15 (2) FFCA.



Graph 1: Commissioners' vacancy rate from 1994-2013.

As indicated by graph 1, the most severe shortage of Commissioners was from 2003 to 2004 and from 2012 to 2013. Those periods saw the Commission operating with the minimum number of Commissioners allowed by the FFCA.

This was clearly problematic for the functioning of the Commission, because during the period 1994 to 2003, the Commission needed to have at least twenty out of twenty-two Commissioners to form a quorum. The problems of unfilled vacancies had previously been communicated to the President,¹⁰⁹ however, as seen in subsequent years,¹¹⁰ no resolution came out of the communication.

On the implementation of the nine Commissioners' structure in 2004 (as mentioned in 2.1 above), the three persons appointed from a list of nominations agreed upon by the Premiers of the provinces and one person to be appointed by local government, were not appointed. The process of appointing the provincial and local government members was not complete and there were five serving Commissioners as of 31 March 2004.¹¹¹

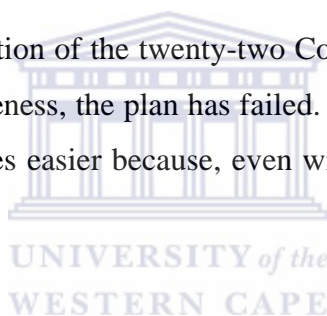
¹⁰⁹ FFC's annual report 1998–1999 5.

¹¹⁰ FFC's annual report 2002–2003 6.

¹¹¹ FFC's annual report 2003–2004 1-2.

From 2005 to 2012, the Commission functioned with only six out of nine Commissioners. Reasons that could be advanced for such a situation include the fact that Commissioners' allowances had not been reviewed since 2008.¹¹² The recommendations in the report of the Ad Hoc Committee on the review of Chapter 9 and associated institutions (the Ad Hoc Committee) that the current system whereby the President determines the remuneration, conditions of employment and other benefits of Commissioners required revision,¹¹³ were ignored. Even then, the report indicated that the determination of salaries was a lengthy process and a cause of some dissatisfaction among the Commissioners.¹¹⁴ By September of 2013 there were five continuing Commissioners¹¹⁵ who were joined by three newly appointed Commissioners.¹¹⁶ Currently the determination of salaries, whether a Commissioner is hired on a part-time or full-time is bestowed to the President.

If the main aim for the reduction of the twenty-two Commissioner structure was to bring about efficiency and effectiveness, the plan has failed. The nine Commissioners structure has not made filling vacancies easier because, even with a reduced number, a pattern of unfilled positions persists.



3.2 Chairperson

The Chairperson of the Commission is mandated with leading the Board of Commissioners, administration and staff matters as the CEO, which includes the carrying out of the decisions of the Commission¹¹⁷ and financial responsibilities as the accounting officer.¹¹⁸

¹¹² FFC's annual report 2010–2011 9.

¹¹³ Report of the Ad Hoc Committee 61.

¹¹⁴ Report of the Ad Hoc Committee 61.

¹¹⁵ FFC's annual report 2012-2013 61.

¹¹⁶ President Zuma appoints new FFC members 02/09/2013

<http://www.presidency.gov.za/pebble.asp?relid=16027> (accessed 20/11/2013).

¹¹⁷ Section 19 (2) (d) FFCA.

¹¹⁸ Section 24 FFCA.

The Commission's inaugural Chairperson served two terms. His successor was in office from July 2004 until July 2005.¹¹⁹ Her term of office was meant to end in June 2009. The third Chairperson was appointed to serve from August 2005 to August 2010. The current acting Chairperson/CEO has moved through the ranks of the Commission. He started as a researcher, served as a programme manager, and became a Commissioner and deputy Chairperson in 2008. He took over the role of an acting Chairperson in September 2010.¹²⁰ His first term as acting Chairperson expired on February 2013 but was extended to February 2015.

3.3 Productive relationship between the Commissioners

Over the years, the relationship between the Commissioners seems to have been harmonious. However, the report of the Ad Hoc Committee indicates that there have been a few significant internal conflicts.¹²¹ It is reported that the conflicts were more procedural, flowing from a lack of formal guidance on the delineation of powers, roles and responsibilities between full-time and part-time Commissioners. In this instance, the Committee recommended that a more formal delineation of the powers, roles and responsibilities of Commissioners was required.¹²²

4. THE ADMINISTRATIVE HARMONY

The general practice is that the CEO should not also play the role of a Chairperson of an institution.¹²³ This brings about challenges for sound institutional governance, since the directing authority and the implementing authority are vested in the same person. The Chairperson is the link between the Board and management and particularly between the Board and the CEO. Therefore the Chairperson ensures that the Board's decisions are executed. The Board should appoint the CEO.

However, different from the general practice the FFC has confined both the CEO and Chairperson roles to one person, as reflected below.

¹¹⁹ Loxton L 'Mokate to head the fiscal Commission' *The Star* 20/06/2004.

¹²⁰ FFC's annual report 2012-2013 19.

¹²¹ Report of the Ad Hoc Committee 61.

¹²² Report of the Ad Hoc Committee 62.

¹²³ Institute of directors in Southern Africa *King report II on corporate governance for South Africa* (2002) South Africa 18.

4.1 Conflation of the Chairperson and the CEO positions

The collective responsibilities of management vest in the CEO, consequently he/she bears the ultimate responsibility for all management functions. The Commission delegates to management via the CEO, who will in turn delegate to those reporting to him. Thus, the link between other senior management and staff is the CEO. In delegating authority, the Commission should establish benchmarks and performance indicators to hold management, specifically the CEO, accountable for decisions and actions delegated to him/her.

From establishment, the general practice of separation of the Chairperson and CEO positions was not considered. Even though there is no evidence of the previous office holders complaining about this combination, it is submitted that there is a need for separation. The amendment of the FFCA in order to remedy the conflation of the two positions, which is in conflict with the PFMA and antithetical to the precepts of good governance practice remains unresolved, and has been on the Commission's executive authority agenda for a few years. However, the Minister of finance as the executive authority has not amended the FFCA.

4.2 Productive relationship between the CEO and the Commissioners

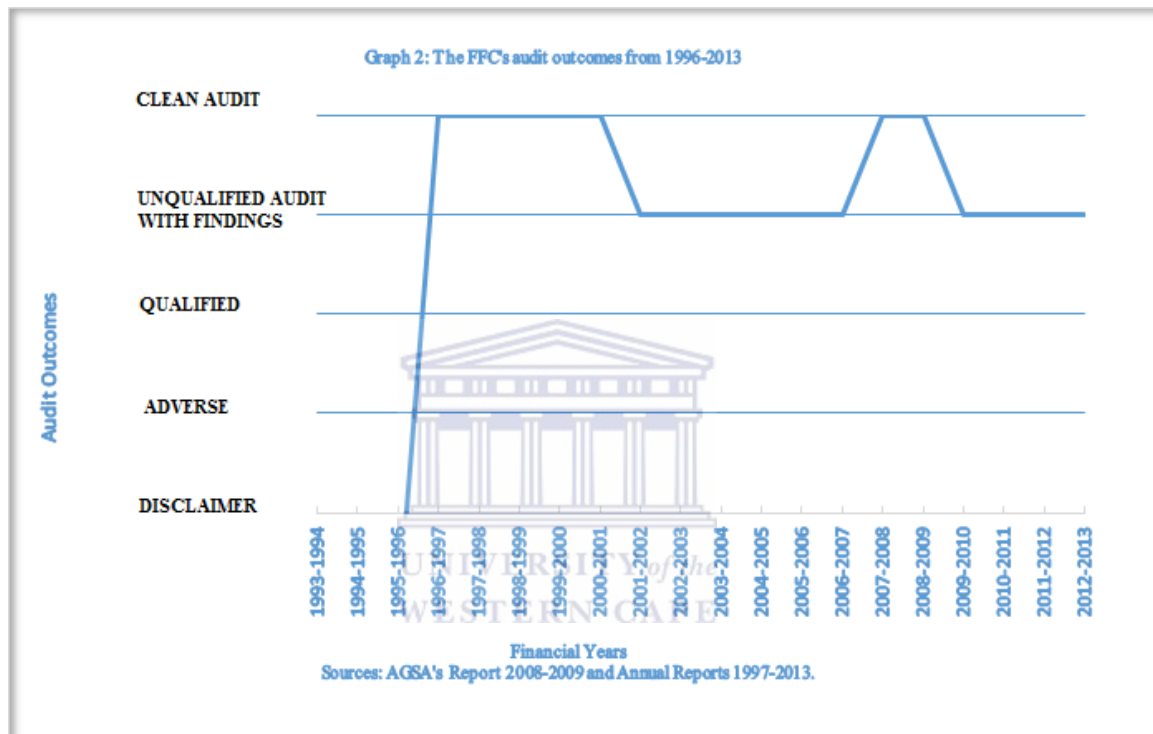
Because the CEO and Chairperson positions are held by the same individual, conflicts arise in the course of performing functions the two positions. Of recent, the conflation has hampered effectiveness because, as reflected in the AGSA's reports,¹²⁴ the acting Chairperson seems to be battling with fulfilling the requirements of both positions,

¹²⁴ In the FFC's annual report 2010-2011 page 100 the AGSA said that "the accounting officer did not exercise adequate oversight over the financial statements, report on predetermined objectives and the compliance process resulting in material adjustments to the financial statements, findings on predetermined objectives, and non-compliance with laws and regulations". In the FFC's annual report 2011-2012 page 108 the AGSA said that "management did not implement proper controls to ensure that the annual financial statements are free from material misstatements" and in the FFC's annual report 2012-2013 page 66 the AGSA said that "the accounting officer did not exercise sufficient oversight responsibility ensuring compliance with laws and regulations as the normal competitive bidding procedures were not followed related to procurement and contract management. Internal control deficiencies resulted in irregular expenses".

coupled with the fact that the number of sitting Commissioners was also at its minimum as opposed to previous years.

5. ECONOMICAL AND EFFICIENT USE OF RESOURCES

Graph 2 below reflects the AGSA’s audit opinions on the FFC’s financial affairs from 1996 to 2013. The vertical axis represents the audit outcomes and the horizontal axis represents the financial years. The audit opinions received for the financial years are reflected by the blue thick line across the graph.



Graph 2: The FFC's audit outcomes from 1996-2013

There are no public records of the Commission’s audit outcomes from 1993 to 1996. Of major concern is the Commission’s inability to comply with legislation,¹²⁵ which is reflected by internal control deficiencies. The deficiencies stem from the initial non-establishment of, or non-operational¹²⁶ internal audit function, the lack of a fraud

¹²⁵ Section 38 (1) (a) (ii) PFMA.

¹²⁶ FFC’s annual report 2001–2002 49.

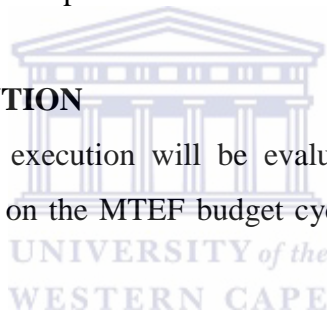
prevention plan¹²⁷ as well as late submission of financial statements¹²⁸ and non-approval for certain agreements requiring the intervention of the executive authority.¹²⁹

In some years¹³⁰ the non-compliance with legislation has led to a threat to the Commission's ability to operate as a going concern, because its current liabilities exceeded its total assets. The Commission has had unauthorised,¹³¹ including fruitless, wasteful and irregular expenditure,¹³² specifically because of non-compliance with the supply chain, procurement and contract management.

The Commission's inability to comply with laws and regulations has been a stumbling block to its attaining clean audits. As compliance pertains to oversight by the Commission, the results indicate that there is some disconnect between the oversight role on the part of the Commission and the CEO as the implementer, which can be attributed to the conflation of the CEO/Chairperson roles.¹³³

6. MANDATE EXECUTION

The Commission's mandate execution will be evaluated by assessing submission of recommendations and inputs on the MTEF budget cycles, the division of revenue bills, and the appropriations bills.



Graph 3 below depicts the Commission's mandate execution from inception until 2013. The vertical axis represents the years and the horizontal axis represents the score barometer. The score barometer indicates the submission or non-submission of the recommendations. The score barometer is classified into four ratings: 100% (submission

¹²⁷ Section 3.2.1 Treasury regulations.

¹²⁸ FFC's annual report 2000–2001 24-25.

¹²⁹ Section 66 (4) PFMA.

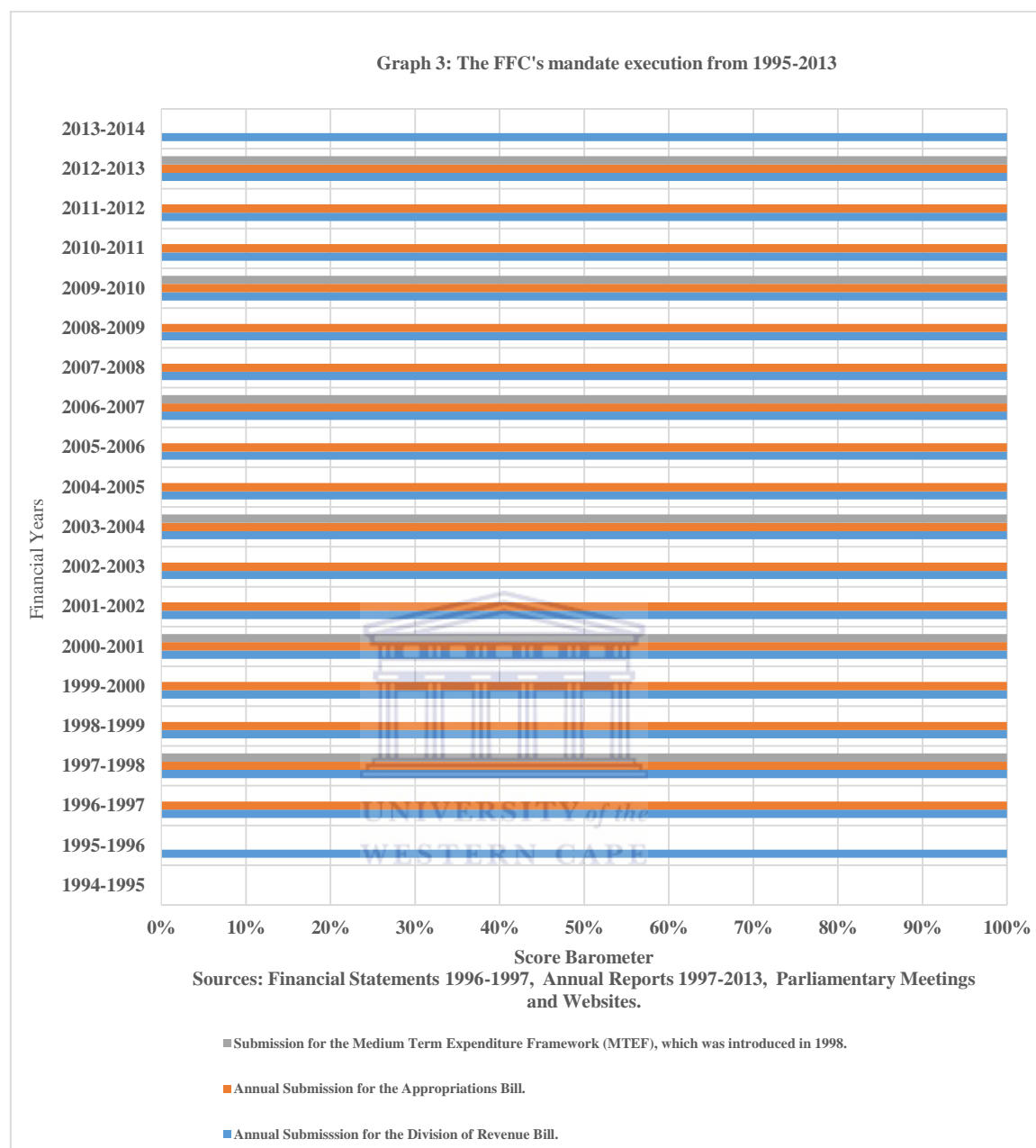
¹³⁰ FFC's annual report 2006-2007 43, FFC's annual report 2010-2011 118, FFC's annual report 2011–2012 128 and FFC's annual report 2012-2013 87.

¹³¹ FFC's annual report 2010-2011 97.

¹³² FFC's annual report 2009-2010 95, FFC's annual report 2010-2011 97 FFC's annual report 2011-2012 120 and FFC's annual report 2012–2013 88. In contravention of Section 40 (1) PFMA, Treasury regulation 16A6.1 and Practice note 8 of 2007/08 paragraph 3.4.1 and Treasury regulation 16A9.1 (d) relating to supply chain management.

¹³³ FFC's annual report 2012–2013 66.

on time); 60–80% (late submission because of external factors); 30–50% (late submission because of internal factors); 0–20% (non-submission).



Graph 3: The FFC's mandate execution from 1995-2013.

The Commission delivered its first set of recommendations on the equitable division of national revenue¹³⁴ in 1995. As shown on graph 3, from 1995 to 2013 the Commission has successfully executed its mandate, without failure. Submissions for the MTEF budget cycles, the annual division of revenue bills and the appropriations bills were submitted, on time.

¹³⁴ Melck AV and Gass C (accessed 20/11/2013).

Throughout the years, the Commission's recommendations and advice have been well received.¹³⁵ According to the report of the Ad Hoc Committee, by 2007, the Commission had a seventy per cent acceptance rate of its recommendations.¹³⁶ This is an indication of the calibre of leadership, knowledge and expertise within the Commission.

Furthermore it should be noted that generally the Commission's recommendations are in line with the government policies of the day. Thus, the recommendations may not necessarily be immediately implemented, because by their very nature they are long term plans, requiring a collective effort, planning and adjustment of plans by various stakeholders.

7. CONCLUDING REMARKS

Throughout the years, the Commission has successfully executed its mandate, which is testament to the calibre of leadership it has had over the years.

However, the non-appointment of Commissioners as it pertains to effective leadership, and the conflation of CEO/Chairperson roles as it pertains to administrative harmony, which are out of control of the Commission, are concerning.

Vacant positions which have been cushioned by the calibre of leadership in place are a concern. The impact of such vacancies may not be immediately felt, but should the situation remain the same, the stability of the Commission might be in jeopardy. The Commission has highlighted the problems of unfilled vacancies to the President since August 1999.¹³⁷ Co-ordination of the functions of the three spheres of government in the appointment and nomination has not been smooth. The issue of the Commission never having a full bench of Commissioners has been normalised. The answer lies in the co-

¹³⁵ Minutes of the select Committee: appropriations on local government fiscal framework, equitable share formula: FFC reports 22/05/2013 <http://www.pmg.org.za/report/20130522-local-government-fiscal-framework-equitable-share-formula-financial-fiscal-Commission-reports> (accessed 20/11/2013).

¹³⁶ Report of the Ad Hoc Committee 58.

¹³⁷ FFC's annual report 1998–1999 5.

ordination of activities between the different stakeholders that nominate and appoint Commissioners.

The Chairpersonship has been vacant for over three years. The conflation of the Chairperson and CEO positions, allied with the workload that these positions carry, is concerning and does not promote good governance. There is a need to have checks and balances in the exercise of authority¹³⁸ as this matter impacts on the delivery of services by the Commission. The President should intervene in the appointment of the Commissioners. The Minister of finance, as the executive authority, should also play his role in addressing the current structural challenges within the Commission.

When assessed on the execution of mandate only, the Commission has successfully executed its mandate. However, statistically, the FFC has obtained more unqualified audits with findings than clean audits. The transition from an unqualified audit to a clean one depends largely on the separation of the CEO and Chairperson roles, in order to allow the appointees to focus on a single role, at a time.

Even though the result of the convergence of the CEO/Chairperson roles is antithetical to the precepts of good governance, it also has direct bearing on the lack of oversight at the FFC. It is impossible for one individual to perform both roles satisfactorily, taking into consideration that the Chairperson should play an oversight role on the CEO. This has resulted in non-compliance with the various legislative precepts on good governance and non-adherence with the PFMA and internal controls.

¹³⁸ FFC's annual report 2012–2013 61.

CHAPTER 4: THE MUNICIPAL DEMARCATION BOARD

1. INTRODUCTION

When the first democratic government came into power in 1994 it was faced with the major task of restructuring spatial matters and rationalising the local government sphere. Until then, the local government sphere was geographically and spatially separated along racial, social and economic lines. To run the process of transformation through redrawing municipal boundaries, the Constitution established an independent authority, the Municipal Demarcation Board (MDB).

While the MDB has been mandated to fulfil its functions independently, the process must be informed by the criteria, factors and objectives outlined in Sections 24 and 25 of the Municipal Demarcation Act 27 of 1998 (MDA).

In this regard, this Chapter outlines the MDB's legal framework, assesses the Board's leadership's effectiveness, administrative harmony, economical and efficient use of resources and execution of mandate.

2. LEGAL FRAMEWORK

The MDB is a constitutional institution, whose functions, roles and composition are set out in the Constitution and various Acts. In giving effect to the constitutional directive,¹³⁹ the MDA was enacted. The Act provides for a Board which is independent, impartial and performs its function without fear, favour or prejudice.¹⁴⁰

2.1 Governance structure

The Board must consist of no fewer than seven and no more than ten members.¹⁴¹ An appointment should be based on qualification or experience or knowledge appropriate to the functioning of the MDB.¹⁴² The appointment process consists of a public invitation issued by the executive authority (Minister of local government), followed by

¹³⁹ Section 155 (3) Constitution.

¹⁴⁰ Section 3 MDA.

¹⁴¹ Section 6 (1) MDA.

¹⁴² Section 7 (1) MDA.

recommendations from a selection panel,¹⁴³ and appointment by the President. A member is appointed for five years without any restriction on the number of terms that may be served.¹⁴⁴ The Board is accountable to Parliament.¹⁴⁵ The Board appoints the manager of the Board/CEO/accounting officer, who holds office for an agreed term not exceeding five years, but which is renewable.¹⁴⁶

2.2 Mandate

The MDB's main function is the determination and re-determination of municipal outer and inner boundaries¹⁴⁷ in accordance with the MDA and other appropriate legislation enacted in terms of Chapter 7 of the Constitution.¹⁴⁸

After every municipal election, municipal boundaries are reviewed. The process of demarcation requires involvement of stakeholders such as the Independent Electoral Commission (IEC) and the Minister of local government. On finalisation of changes to municipal outer-boundaries by the MDB, they are handed over to the IEC so that the Commission can delimit voting district, register voters and for the national common voters roll to be divided into municipal segments for the national and provincial elections.

On completion of outer boundaries, wards are delimited for the next local elections. In terms of Item 4 of Schedule 1 of the Municipal Structures Act 117 of 1998 (MSA), the MDB after consulting the IEC must delimit a municipality into wards, with each ward having approximately the same number of voters. The process is preceded by the publication by the Minister of local government of a formula to determine the number of Councillors for municipal Councils. This is followed by the Members of the Executive Council's (MECs) determination of the number of Councillors for each municipality in their provinces. Thereafter, the determination of the number of wards and delimitation of ward boundaries is undertaken by the Board. This process is finalised by a handover of the wards to the IEC by the MDB, for preparation of municipal elections.

¹⁴³ Section 8 (1) (b) MDA.

¹⁴⁴ Section 9 (1) and (2) MDA.

¹⁴⁵ Section 39 MDA.

¹⁴⁶ Section 32 MDA.

¹⁴⁷ Section 155 (3) (b) Constitution and Section 21 MDA.

¹⁴⁸ Section 155 (3) (b) Constitution and Section 4 MDA.

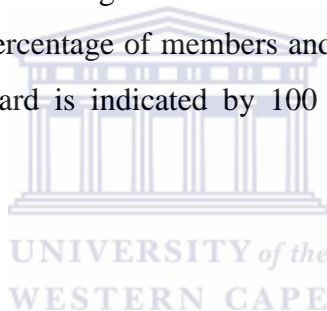
The Board has a statutory function, which involves the performance of capacity assessments for local and district municipalities in terms of the MSA, in order to advise MECs on whether certain powers should be reallocated between districts and local municipalities.¹⁴⁹

3. EFFECTIVE LEADERSHIP

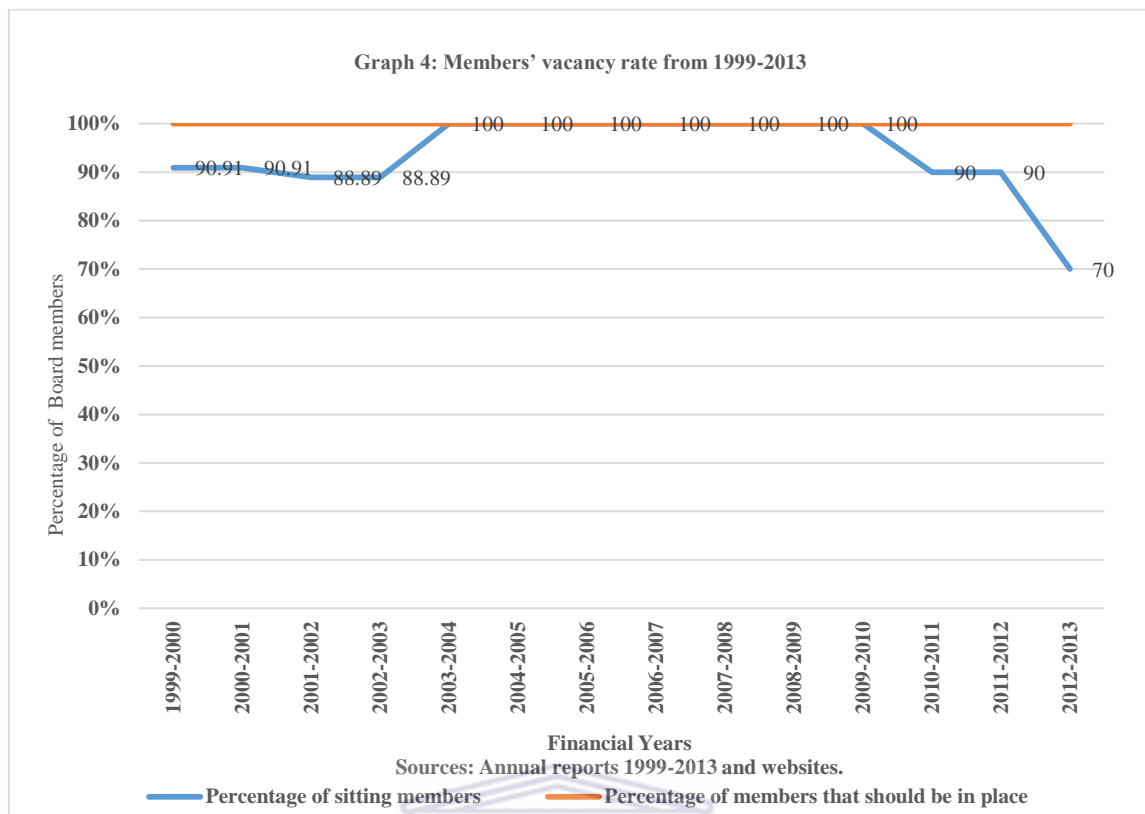
Effective leadership is linked to the Board's ability to execute its mandate. It is the ability to deliver decisions on time. This ability is influenced by the MDB having a fulltime Chairperson in place, at all times, enough Board members to carry out the tasks of the Board and a harmonious relationship between the members, which are assessed below.

3.1 Vacant Members' positions

Graph 4 below indicates the percentage of members in office for each financial year. The vertical axis represents the percentage of members and the horizontal axis represents the financial years. The full Board is indicated by 100 per cent and a lower percentage indicates unfilled positions.



¹⁴⁹ Section 85 MSA.



Graph 4: Members' vacancy rate from 1999-2013.

The first Board consisted of eleven members,¹⁵⁰ but a member resigned during that financial year, leaving the Board with a full-time Chairperson and nine part-time members.

It is assumed that between 2001 and 2002 the executive authority altered the number of Board members in terms of Section 6 (2)(a) of the MDA, and decided that the Board continue functioning with nine members, because none of the available records indicates a resignation/death of a member from the ten members mentioned in 2001. However, the 2001–2002 annual report states that a member took official leave to study, leaving the Board to function with a full-time Chairperson and seven part-time members.¹⁵¹

The second Board, consisting of nine members was appointed in February 2004. The third Board, consisting of ten members took office in February 2009.

¹⁵⁰ MDB's annual report 1999–2001 2 and Legislation governing the demarcation process <http://www.cogta.gov.za/subwebsites/publications/demarcation/dm6.htm> (accessed 20/11/2013).

¹⁵¹ MDB's annual report 2001–2002 1.

The Board should consist of no fewer than seven and no more than 10 members.¹⁵² During the 2012 to 2013 financial year the Board operated with seven Board members. This means that if one of the Board members were to resign or die, the Board would not be legally constituted. This would render the Board inactive and its decisions invalid.

3.2 Chairperson

With the exception of the period 2002/2003 to February 2004 the Board has always had a full-time Chairperson. During the 2002 to 2003 financial year, the Chairperson vacated office as a full-time member and joined the Board as a part-time member. Thus, from the time of the Chairperson's departure until the second Board's appointment in February 2004, the Board did not have a Chairperson, nor a full-time member in office.

3.3 Productive relationship between the Board members

Overall, the relationship between the members seems to have been harmonious over the years.

The general impression from the data obtained is that the MDB has an effective leadership in place, but on closer look it is clear that the Board's ability to function effectively within the legal boundaries set out in the enabling Act¹⁵³ might be negatively affected if it continues to function with the minimum allowed members. The unfilled vacancies should be dealt with immediately for the functioning of the Board to be strengthened. It is also the opinion of the author that there is a need to increase the number of full-time members.

4. ADMINISTRATIVE HARMONY

The Board appoints a manager to be the CEO and accounting officer for the Board. The appointment is on a contractual term not exceeding five years, but which may be renewed.¹⁵⁴

¹⁵² Section 6 (1) MDA.

¹⁵³ Section 6 (1) MDA.

¹⁵⁴ Section 32 (2) (a) MDA.

4.1 Productive relationship between the Board members and the CEO

The first CEO appointee was dismissed in 2000 after being found guilty of gross misconduct.¹⁵⁵ Consistency and stability reigned with the second appointee holding the position for two terms, leaving on expiration of his contract in 2011.

During the period 2011 to 2012, the Board appointed one of its part-time members to be acting CEO whilst finalising the appointment of a new CEO.¹⁵⁶ However, it should be remembered that the Board hires, fires, and evaluates the CEO. In effect, the Board as a collective is the CEO's supervisor. For the same individual to be voting on the Board and influencing decisions about his role creates a conflict of interest. If the CEO were able to sway Board decisions by voting, the Board's independent role in supervising the CEO is at risk. The Board also sets the CEO's salary, so it clearly doesn't make sense for the CEO to vote on that decision.

Assuming that the CEO could recuse himself from discussions that involve him personally, the appropriateness and practicality of this would be limited. As the senior official, the CEO already wields a great deal of power. He is likely to be better informed than others on institutional matters. The CEO controls much of the flow of information to the Board and, for the most part, controls the recruitment of staff.¹⁵⁷ The question arises if the Board would be decisive in taking actions against one of their own should a situation of gross misconduct occur under his tenure.

Overall, the Board has had harmonious relationships with their CEOs, with the exception of the first appointee. The ability of the first Board to take decisive steps against misconduct indicates its ability to promote an institutional environment which adheres to elements of good governance, in order to alleviate any occurrence of similar episodes. However, the hiring one of its own members as a CEO by the third Board indicates poor judgement.

¹⁵⁵ MDB's annual report 2002–2003 1-3.

¹⁵⁶ MDB's annual report 2012–2013 10.

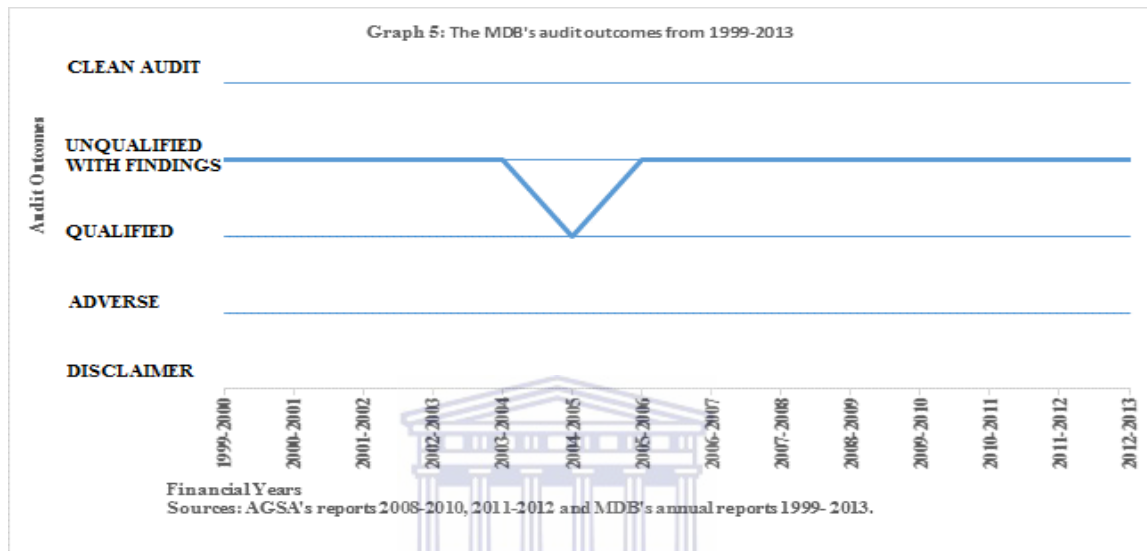
¹⁵⁷ Rosenblatt B 'Should the CEO have a vote on the Board'

<http://www.compasspoint.org/Board-cafe/should-ceo-have-vote-Board>

(accessed 20/11/2013).

5. ECONOMICAL AND EFFICIENT USE OF RESOURCES

Graph 5 below, shows the Board's use of financial resources throughout its existence. The vertical axis indicates audit outcomes received for each financial year and the horizontal axis shows the financial years. The audit outcomes are indicated by the thick blue line across the graph.



Graph 5: The MDB's audit outcomes from 1999-2013.

5.1 Graph analysis

With exception of the period 2004 to 2005, the MDB has received and sustained financially unqualified audits, with findings raised on reporting of predetermined objectives and non-compliance with legislation, over the years.

From establishment the Board has battled to comply with laws¹⁵⁸ and regulations¹⁵⁹ applicable to internal control measures, as well as with setting up systems for monitoring and management of assets in place and, so far, this pattern has resulted in the Board's inability to obtain a clean audit.¹⁶⁰

¹⁵⁸ Preferential Procurement Policy Framework Act 5 of 2000 and Section 40 (1) (c) PFMA.

¹⁵⁹ National treasury regulations of 2005 and national treasury instruction note of 15 September 2010, treasury regulation 16A and supply chain management practice notes issued by the National Treasury, treasury regulation 13.2.

¹⁶⁰ AGSA's report 2005-2006 147 and 149 and MDB's annual report 2008-2009 1.

In recent years, the Board's supply chain, procurement and contract management has led to procurement of goods/services without following the correct procedure and internal controls, therefore resulting in irregular expenditure.¹⁶¹ The situation prompted the Select Committee on Public Accounts (SCOPA) to pass a resolution requiring the MDB to ensure that procurement is in line with the treasury regulations and that proper information technology and system controls are established.¹⁶² Subsequent to the resolution there are still challenges with the internal audit function which does not comply with the requirements of some of the treasury regulations.¹⁶³

In previous years, the Board's liabilities exceeded its assets, thus it operated at a deficit, which threatened its ability to continue as a going concern.¹⁶⁴

The MDB's lack of ability to move to a clean audit is influenced by the degree to which it complies with laws and regulations, specifically on expenditure, procurement, and supply chain management. As attested by AGSA, the lack of progression towards clean administration can be attributed to management developing action plans which do not address the root cause of the findings reported; actions not being specific and/or failure to assign responsibility for tasks; and/or timelines not being determined for ultimate resolution of internal and external audit findings.¹⁶⁵

6. MANDATE EXECUTION

Generally, the MDB follows two cycles between local government elections; namely, municipal boundary redetermination (re-alignment and adjustment, consolidation and annexation or amalgamation and re-categorisation) and ward delimitations. The municipal capacity assessments are an annual occurrence, completed when there is a need or upon a request.

¹⁶¹ MDB's annual report 2006–2007 6, AGSA's report 2005–2006 147 and 149, AGSA's report 2008–2009 16 and 42, MDB's annual report 2011–2012 44-46, MDB's annual report 2012–2013 45-46 and MDB's annual report 2009–2010 40.

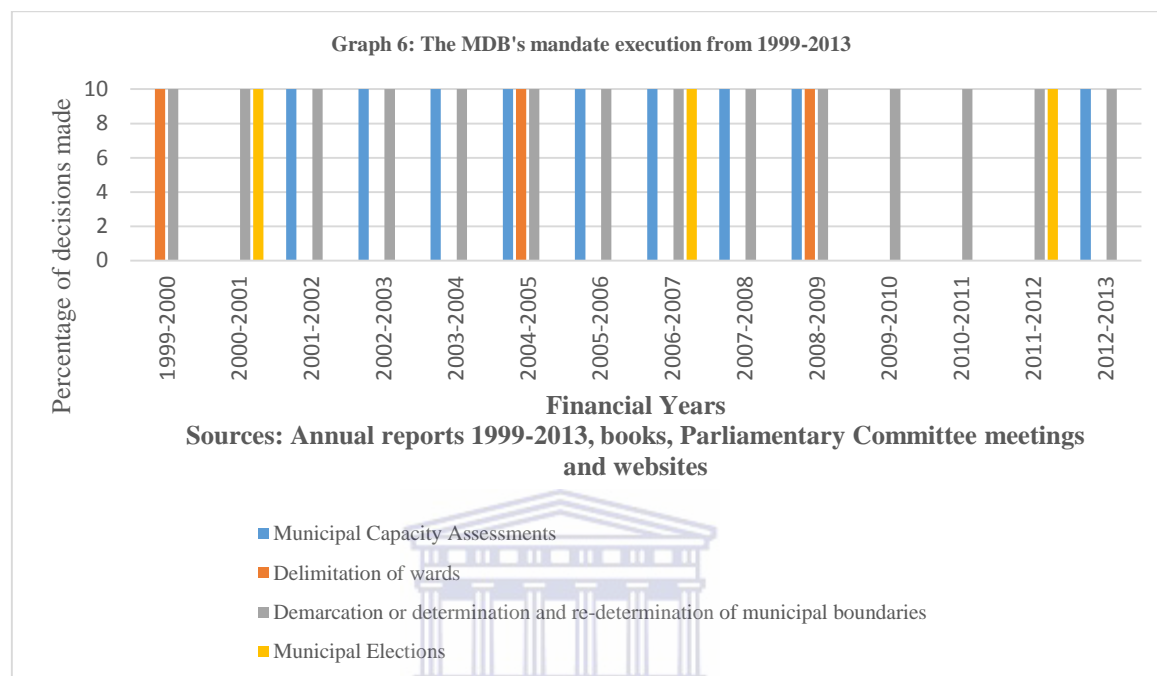
¹⁶² MDB's annual report 2006–2007 7.

¹⁶³ AGSA's report 2011–2012 30.

¹⁶⁴ MDB's annual report 2006–2007 5 and AGSA's report 2004–2005 138.

¹⁶⁵ AGSA's report 2011–2012 29 and 30.

As shown on graph 6 below, the Board’s mandate execution is evaluated by assessing decisions made on the determination of municipal boundaries, the delimitation of wards and assessment of municipal capacity. An execution of the mandate is reflected by ten per cent, whilst a lower percentage reflects non-attainment. The MDB’s first annual report covers the period from 1999 to 2001.



Graph 6: The MDB's mandate execution from 1999-2013.

Since the Board’s establishment there have been three municipal elections, which were held in December 2000, March 2006 and May 2011. These are reflected by a yellow colour on graph 6 above. Following the elections, reviews of municipal boundaries commenced in January 2001, April 2006 and June 2011 respectively.

The Board’s first major demarcation process led to a reduction from 843 to 284 municipalities consisting of six metropolitans, 47 districts, and 231 local municipalities as well as a delimitation of 3 754 wards.¹⁶⁶ For the 2006 elections, the demarcation process

¹⁶⁶ Mlokoti V ‘On spatial re-configuration in South Africa and the value of an independent demarcation body’ in Steytler N (ed) *Municipal Demarcation Board 10th year celebration: the first decade of the Municipal Demarcation Board: some reflections on demarcating local government in South Africa* (2009) 3.

resulted in the determination of two new metropolitan municipalities, which were initially meant to have been three,¹⁶⁷ and 3 895 delimited wards.

The MDB handed over final municipal wards to the IEC on 1 September 2010, for preparations for the 2011 local government elections.¹⁶⁸ There were 4 277 delimited wards which were contested in the eight metropolitans, 45 districts and 231 local municipalities.

The past three local government elections which were followed by reviews of municipal boundaries have attested to the Board's ability to always deliver on its mandate without delay.

6.1 Independence of the Board

Independence presupposes that the Board's decisions may not be subject to amendments or be vetoed by anyone, including government.

In recent years, there have been court cases¹⁶⁹ by communities and events that have questioned the Board's independence in decision-making. However, the courts' rulings have pointed to an independent Board which accurately follows the guidelines in the Constitution and enabling legislation.

The question of how the Board makes its decisions was first mentioned in the *Matatiele* case, whereby the constitutionality of the twelfth constitutional amendment Act, which resets the provincial borders, and the cross-boundary municipalities laws repeal and related matters Act, which realigns the boundaries of the affected municipalities, was questioned. It was argued that in passing the two bills, Parliament exceeded its powers

¹⁶⁷ Mlokoti V (2009) 4.

¹⁶⁸ MDB hands over municipal ward for the 2011 local government elections
http://www.buffalocity.gov.za/municipality/mediaroom/2010/demarcation_Board.pdf
(accessed 20/11/2013).

¹⁶⁹ *Matatiele Municipality and others v President of the Republic of South Africa and others* 2006 (5) SA 47 (CC) paras 40 and 105 and *Merafong Demarcation Forum and others v President of the Republic of South Africa and others* 2008 (10) BCLR 968 (CC) paras 4 and 297.

because, although it may legally demarcate provinces, the demarcation of municipalities is the preserve of the constitutionally independent MDB.¹⁷⁰

Recently, there have been queries about the independence and operations of the Board. Some of the ruling party's members appear to be concerned about the MDB and have accused the Board of drawing up boundaries that put their party at a disadvantage.¹⁷¹ This has resulted in the ruling party urging the government to review the MDB's role, functions, scope and composition as well as the criteria it uses to decide ward and municipal boundaries.¹⁷² By late 2012, a Ministerial demarcation process review task team with a mandate to review and monitor the processes that the MDB undertakes was established. However, the task team's presence and impact has not been felt at the current moment. In view of the fact that no court case has been decided against the Board, it would seem that it has performed its mandate according to the law.

There was a recent incident where the Minister of local government sought to stop the demarcation process in order to quell community protesters by stepping into, and putting a halt¹⁷³ to the municipal demarcation process.¹⁷⁴

During the 2006 elections, the demarcation process resulted in the establishment of two new metropolitan municipalities, which were initially intended to be three.¹⁷⁵ The Board decided to issue a notice at the eleventh hour, re-opening the discussion on its earlier

¹⁷⁰ Robinson V 'Cross-border dispute splits community' *Mail and Guardian* 17/02/2006

<http://mg.co.za/article/2006-02-17-crossborder-dispute-splits-community>

(accessed 20/11/2013).

¹⁷¹ Tabane R 'Addressing citizen distrust' *Mail and Guardian* 09/03/2012

<http://mg.co.za/article/2012-03-09-addressing-citizen-distrust> (accessed 20/11/2013).

¹⁷² Resolutions of the ANC's 53rd national conference, Mangaung, 16-20 December 2012.

¹⁷³ Sasolburg: Board has final say on boundaries *News 24* 23/01/2013

<http://www.news24.com/SouthAfrica/Politics/Sasolburg-Board-has-final-say-on-boundaries-20130123>

(accessed 20/11/2013).

¹⁷⁴ Patel K 'Zamdela: A failure of the public consultation process' *Daily Maverick* 31/01/2013

<http://www.dailymaverick.co.za/article/2013-01-31-zamdela-a-failure-of-the-public-consultation-process#.UotLwCYaLDc> (accessed 20/11/2013).

¹⁷⁵ Mlokoti V (2009) 4.

determination. It soon surfaced that it had buckled under pressure from the MEC to reconsider its decision about granting Msunduzi municipality a metropolitan status.¹⁷⁶

The above events indicate a worrying pattern of outside influences affecting the independence of the Board. Any further events of this nature will jeopardise the functioning of the Board.

6.2 Impartiality of the Board

The impartiality and integrity of the Board members have been questioned in various public platforms,¹⁷⁷ with allegations of conflict of interest by members. The neutrality of the current Chairperson of the Board has been questioned, with allegations that he has some interest in certain municipal mergers.

Although there is nothing in the Constitution and enabling legislation that stops a Board member from carrying on other business activities beyond the functioning of the Board, and as it is said that the MDB's decisions are made by a collective, the reality is different.

However continuous allegations of conflict of interest, whether real or perceived, will in the long run impact negatively on the credibility of Board members and the independence of the Board, whose reputation depends largely on the public view.

However true that decisions are made collectively, the mere fact that one is appointed a Chairperson means that he/she holds more power than any of the Board members and the fact that she/he is the only full-time member of the Board means he has first-hand knowledge of the activities of the Board than a part-time member. The reasoning that decisions are made by a collective may not necessarily ring true in practice.

¹⁷⁶ Naidoo N 'MEC asks for rethink of metro status for Pietermaritzburg' *The Witness* 19/10/2009 <http://www.witness.co.za/index.php?showcontentandglobal%5bid%5d=29581> (accessed 20/11/2013)

¹⁷⁷ SAPA 'DA undermining MDB decisions' *Times Live* 24/10/2013 <http://www.timeslive.co.za/politics/2013/10/24/da-undermining-municipal-demarcation-Board-decisions> (accessed 20/11/2013)

7. CONCLUDING REMARKS

The MDB has done reasonably well in assisting and facilitating the MLG system. The Board's constitutional mandate has been executed effectively and efficiently. The Board has not functioned according to the elements of good governance because, while there are no conflicts amongst members, the vacancy rate is problematic to a well-functioning institution.

Financial probity has also been a problem, specifically compliance with laws and regulations. However, various allegations emanating from external factors such as political parties and communities have the ability to derail the Board's functioning in the long run, and may negatively impact on the independence of the Board and thus the functioning of the system of MLG.



CHAPTER 5: THE SOUTH AFRICAN HERITAGE RESOURCES AGENCY

1. INTRODUCTION

The National Heritage Resources Act 25 of 1999 (NHRA) whose aim is to create an integrated framework for the management of heritage resources in the country, calls for a three-tier system for heritage resources management in the Republic.

The Act established the South African Heritage Resources Agency,¹⁷⁸ as a national administrative body responsible for identification and management of grade I heritage resources, amongst others. However, the provincial level functions are the responsibility of provincial heritage resources authorities (PHRAs) and local level functions are the responsibility of local authorities. The PHRAs are established by the Member of the Executive Council (MEC) dealing with Arts and culture matters of each province.

However, the other spheres' competence to carry out the functions in terms of the NHRA is dependent on an assessment by SAHRA in the case of PHRAs,¹⁷⁹ and PHRAs in the case of local authorities,¹⁸⁰ before there is devolution of powers and functions to the latter.

As much as the roles of the three spheres are spelt out in the NHRA, co-operation between the three heritage authorities is key to ensuring service delivery to the public. With the establishment of the PHRAs and local authorities, comes the need to adhere to the principles of co-operative governance as enshrined in the Constitution. Therefore, whilst SAHRA may not be a direct intergovernmental relations institution, it must facilitate and integrate its functioning with the other two spheres and co-ordinate the identification and management of heritage resources.¹⁸¹

¹⁷⁸ Hereafter referred to as SAHRA (the NHRA differentiates between SAHRA and SAHRA's Council). It is a Schedule 3A public entity in terms of PFMA, an Agency of the Department of Arts and culture established in terms of Section 11 NHRA.

¹⁷⁹ Section 8 (6) (a) (i) NHRA.

¹⁸⁰ Section 8 (6) (a) (ii) NHRA.

¹⁸¹ Section 8(2) NHRA.

The scope of SAHRA's functionality calls for the principles of co-operative government and intergovernmental relations¹⁸² to be central in the performance of its mandate and management of the country's heritage resources.

This Chapter evaluates SAHRA's legal framework and its leadership's effectiveness. The Chapter also assesses the Agency's administrative harmony, economical and efficient use of resources and execution of mandate.

2. LEGAL FRAMEWORK

Schedule 4A of the Constitution places cultural matters, which when broadly defined include heritage, under national and provincial jurisdiction. However, Schedule 5A of the Constitution indicates that provincial cultural matters fall within the ambit of competence of each province.

The implication of these provisions is that both spheres may enact legislation on cultural matters, but provinces are limited to establishing policies, objectives and strategy plans for heritage resources management within their provinces.¹⁸³

2.1 Governance structure

The decision-making body of SAHRA is the Council, the Councillors of which are appointed by the Minister of Arts and culture. Unlike the FFC and MDB, the independence of SAHRA's Council is not outlined in the NHRA, but rather implied through its mandate and functionality. According to the NHRA the Council should consist of at least nine but not more than fifteen Councillors, of whom nine must represent each of the provinces, and the CEO. In practice, the Chairpersons of the PHRAs are the nine representatives from provinces.¹⁸⁴

Councillors must be appointed based on qualifications or special experience or interest in fields relevant to heritage resources as well as the financial knowledge needed for the

¹⁸² Section 41 Constitution.

¹⁸³ Section 24 (1) (g) NHRA.

¹⁸⁴ Meeting of the Portfolio Committee: Arts and culture (hereafter referred to as PCAC) on SAHRA's annual reports 2010/11 01/11/2011 <http://www.pmg.org.za/report/20111102-south-african-heritage-resources-Agency-their-201011-annual-report> (accessed 20/11/2013).

efficient functioning of SAHRA.¹⁸⁵ Councillors are appointed for a period not exceeding three years, but may be reappointed.¹⁸⁶ No Councillor may serve more than two consecutive terms.¹⁸⁷

If a Councillor dies or vacates office before the expiration of the period for which he/she has been appointed, another person may be appointed to fill the vacancy for the unexpired portion of the period for which the Councillor was appointed.¹⁸⁸ The Minister of Arts and culture, after consultation with the Council, may remove a Councillor from office if he/she is of the opinion that there sound reasons for doing so, after hearing the Councillor on those reasons.¹⁸⁹

2.2 Mandate

The Council is required to promote the co-ordination of policy formulation and planning for the management of the national estate at national and provincial levels,¹⁹⁰ amongst others.

According to the NHRA, the Council's main functions include: hearing appeals against decisions of a Committee or other delegated representative of SAHRA by the SAHRA Council's appeals Committee;¹⁹¹ identification, declaration, management and protection of grade I national heritage sites;¹⁹² and assessment of PHRAs to perform their functions in terms of the Act.¹⁹³

2.3 Intergovernmental relations between the three heritage authorities

The NRHA anticipates an integrated system for heritage resources management where all three authorities from the spheres have clearly defined functions within their jurisdiction. However, the principles of co-operative government and intergovernmental relations

¹⁸⁵ Section 14 (2) NHRA.

¹⁸⁶ Section 14 (5) NHRA.

¹⁸⁷ Section 14 (6) NHRA.

¹⁸⁸ Section 14 (7) NHRA.

¹⁸⁹ Section 14 (4) NHRA.

¹⁹⁰ Section 16 (d) NHRA.

¹⁹¹ Section 49 NHRA.

¹⁹² Sections 8(2) and 11(a) NHRA.

¹⁹³ Section 8 (6) (a) (i) NHRA.

should apply between the three heritage authorities. Therefore, the spheres and heritage entities should be assisting and supporting one another, informing one another of, and consulting one another on matters of common interest and co-ordinating their actions and legislation with one another.¹⁹⁴

Three factors necessitate cooperative government and intergovernmental relations¹⁹⁵ in an integrated system for management of heritage resources and matters in the country. First, cultural matters which are the basis for the heritage powers and functions are a concurrent function of the national and provincial governments. Second, the NHRA require that there should be devolution of heritage functions from SAHRA to PHRA and from PHRA to local heritage authorities.¹⁹⁶ Third, although there is no legislative requirement that the provincial representatives in SAHRA should be Chairpersons of the PHRAs, a rule of practice has developed which ensure that each PHRA Chairperson is a provincial representative on SAHRA Council.

3. EFFECTIVE LEADERSHIP

Effectiveness requires that not only should there be a Council, but that the Council collectively makes decisions on behalf of SAHRA. The Councillors are appointed based on qualifications or special experience or interest in fields relevant to heritage resources as well as on financial knowledge needed for the efficient functioning of the Agency.¹⁹⁷

Effective leadership is linked to the Agency's ability to execute its mandate. It is the ability to deliver decisions on time. This ability is influenced by the Agency having a Council at all times, having sufficient Councillors to carry out its tasks, and on harmonious relationships between Councillors.

There are several information discrepancies in the Agency's annual reports, the parliamentary Committee meetings and the AGSA's reports regarding the availability of the Council and the number of Councillors in office during certain periods. Therefore, in

¹⁹⁴ Section 41 Constitution.

¹⁹⁵ Section 7 (1) NHRA.

¹⁹⁶ Sections 4 (d), 8 (1) and 8 (6) NHRA.

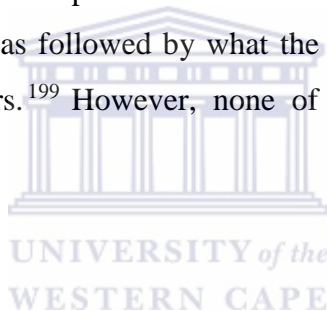
¹⁹⁷ Section 14 (2) NHRA.

compiling graphs 7, 8 and 9, the author used the Agency's annual reports as guides, but where there was a contradiction between them and other sources, the latter were used.

3.1 Vacant Councillors' positions

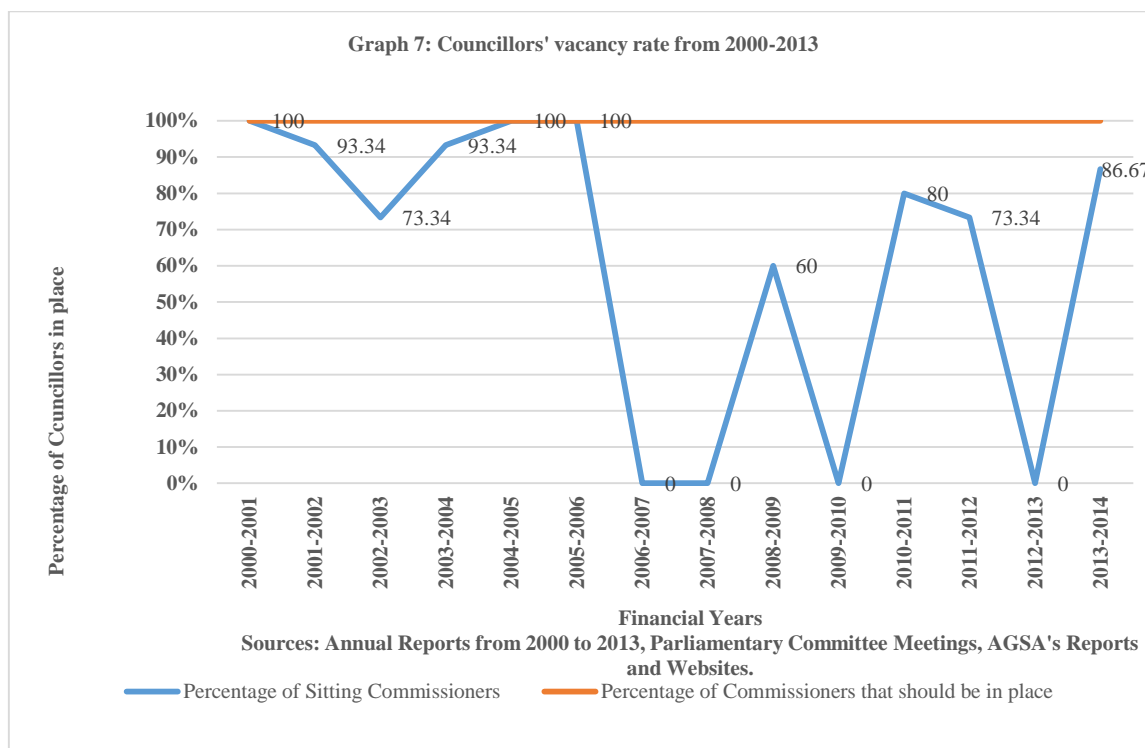
Graph 7 below indicates the percentage of Councillors in office during various financial years. One hundred per cent indicates a full composition of Councillors, and nought per cent indicates that there was no Council appointed.

However, it should be noted that certain distinct events, such as the fact that a month after appointment of the first Council, four Councillors were informed that the Department of Arts and culture had cancelled their further participation in SAHRA matters, were not captured on the graph. The four Councillors were not given reasons for their dismissal. It later became known that the Minister of Arts and culture had not authorised their dismissal and they resumed participation in the affairs of the Agency three months after appointment.¹⁹⁸ This event was followed by what the author assumes to be resignations by Councillors in later years.¹⁹⁹ However, none of the annual reports outlines such resignations.



¹⁹⁸ SAHRA's annual report 2000–2001 3.

¹⁹⁹ SAHRA's annual report 2002–2003 5.



Graph 7: Councillors' vacancy rate from 2000-2013.

According to the 2006-2007 annual report, the Council had a full composition of fifteen Councillors.²⁰⁰ However, the 2007-2008 annual report indicates that no new Councillors had been appointed since 30 SEPTEMBER 2006 and the Agency was left without a newly appointed Council.²⁰¹ However, in contradiction to the former statement, the very same 2007-2008 annual report has a list of Councillors who served during this period.

The 2008-2009 appointed Council was also marred by vacant positions²⁰² and resignations,²⁰³ and it was in office for a maximum of one year.²⁰⁴ The Council which occupied office in July 2010,²⁰⁵ was in office eighteen months after the previous one's

²⁰⁰ SAHRA's annual report 2006-2007 7.

²⁰¹ SAHRA's annual report 2007-2008 99.

²⁰² SAHRA's annual report 2008-2009 4.

²⁰³ SAHRA's annual report 2009-2010 4.

²⁰⁴ PCAC on Robben Island Museum and SAHRA on their 2009/10 annual reports

16/11/2010 <http://www.pmg.org.za/report/20101117-robben-island-museum-audit-outcomes-200910-presentation-south-african> (accessed 20/11/2013).

²⁰⁵ SAHRA's annual report 2011-2012 9.

departure.²⁰⁶ There is an indication that there was an absence of leadership around 2012.²⁰⁷ The current Council, which was appointed in 2013, has thirteen members.²⁰⁸

The information obtained on vacant positions and resignations is that they were all caused by non-appointment of PHRA representatives by the MECs. The general understanding is that the situation is a result of a lack of clarity on the role of PHRA's representatives in the SAHRA Council, and the lack of formal mechanism of enforcing MECs from appointing provincial representatives to SAHRA's Council.²⁰⁹ The remuneration of Councillors has also been put forward as another reason for a high number of vacant positions and resignations amongst the Councillors.²¹⁰

3.2 Chairperson

The Chairperson of the Council is elected from the appointed members of the Council and holds office for the period or the unexpired portion of the period for which he or she has been appointed as a Councillor, unless the Council otherwise determines.²¹¹ If the Chairperson of the Council vacates the office before the expiration of the period for which he was appointed, another Councillor must be elected as a Chairperson of the Council from the appointed Councillors.

The inaugural Chairperson resigned four months after his appointment²¹² but was replaced by another one who held office until 2006. There is an indication that no new

²⁰⁶ Meeting of SCOPA on the Department of Arts and culture, National Arts Council, SAHRA 2010-2011 annual reports 29/05/2012 <http://www.pmg.org.za/report/20120529-Department-arts-culture-national-arts-Council-sa-heritage-resources-a> (accessed 20/11/2013).

²⁰⁷ SAHRA's annual report 2012–2013 10 and 14.

²⁰⁸ The current Council <http://www.sahra.org.za/about/sahraCouncil> (accessed 20/11/2013).

²⁰⁹ SAHRA's annual report 2012–2013 12.

²¹⁰ PCAC on SAHRA's progress: briefing 05/09/2012 <http://www.pmg.org.za/report/20120905-south-african-heritage-resources-association-state-affairs> (accessed 20/11/2013) and on SAHRA's annual reports 2010-2011 01/11/2011 <http://www.pmg.org.za/report/20111102-south-african-heritage-resources-Agency-their-201011-annual-report> (accessed 20/11/2013).

²¹¹ Section 15 (1) NHRA.

²¹² SAHRA's annual report 2000–2001 4.

Councillors were appointed after 30 September 2006,²¹³ thus the same applies to the Chairperson position. The year 2007–2008 saw a third Chairperson appointed, who was in office until December 2008. From January 2009 to July 2010 there was no Chairperson in office. The fourth Chairperson was in office from July 2010 until July 2013, and the current one started in September 2013.²¹⁴

3.3 Productive relationship between the Councillors

There have been several indications of non-productive and conflict-ridden relationships between Councillors. On being questioned by the PCAC about claims of division by some Councillors, a Councillor denied any division between Councillors. However, the very same Councillor suggested that there may be a need to look into a way to constrain Councillors who go astray.²¹⁵

There are allegations that the fourth Chairperson preferred autonomy and side-lined other Councillors.²¹⁶ Throughout his Chairpersonship, there was never a full Council attending parliamentary meetings.²¹⁷ This was questioned on several occasions.²¹⁸ In the words of some of the PCAC members ‘the Chairperson seemed to have been fighting all the time with everyone, therefore may be the problem that needed to be replaced or the challenge might remain’.²¹⁹ The Chairperson of the PCAC indicated that she had received information about the problems within the Agency, from people within the Agency.²²⁰

²¹³ SAHRA’s annual report 2007–2008 99.

²¹⁴ The current Council (accessed 20/11/2013).

²¹⁵ PCAC 05/09/2012 <http://www.pmg.org.za/report/20120905-south-african-heritage-resources-association-state-affairs> (accessed 20/11/2013).

²¹⁶ PCAC on the 2012/2013 anticipated audit outcomes of the Department: briefing by AGSA; audit outcomes and turnaround strategy: briefing by SAHRA 20/03/2013 <http://www.pmg.org.za/report/20130320-20122013-anticipated-audit-outcomes-Department-arts-culture-briefing> (accessed 20/11/2013).

²¹⁷ PCAC 20/03/2013 <http://www.pmg.org.za/report/20130320-20122013-anticipated-audit-outcomes-Department-arts-culture-briefing> (accessed 20/11/2013).

²¹⁸ PCAC 20/03/2013 <http://www.pmg.org.za/report/20130320-20122013-anticipated-audit-outcomes-Department-arts-culture-briefing> (accessed 20/11/2013).

²¹⁹ PCAC 05/09/2012 <http://www.pmg.org.za/report/20120905-south-african-heritage-resources-association-state-affairs> (accessed 20/11/2013).

²²⁰ PCAC on the Department’s fourth quarter expenditure report; SAHRA on turnaround

However, she warned against victimising people within the Agency who had brought information to the Committee or who had exposed failings within SAHRA.²²¹

Most conflicts amongst Councillors involved the CEO's office. There are allegations that some of the Councillors were working with a former CEO, and were trying to prevent the collective Council from investigating her. One disgruntled Councillor went to the Public Protector and the Minister of Arts and culture²²² in order to stop the Council from questioning the validity of employment and lack of employment contract by the CEO. In this regard, it was mentioned that there was a Councillor who was manipulative and had appealed to the Minister of Arts and culture when defeated by a Council vote.²²³

Whereas this Chapter is specifically about SAHRA, one should be mindful that there have been several claims of interference in the functioning of state institutions which fall within the Department of Arts and culture. Some of the allegations include political pressure brought to bear by the Minister of Arts and culture, breaches of corporate governance principles made with the knowledge of, and the use of Councillors by the Minister.²²⁴

There are allegations of wrongful appointment of Councillors, threats made to, and disbandment of Council.²²⁵ At one state institution, there was a claim that only one

strategy 05/06/2013 <http://www.pmg.org.za/report/20130605-Department-arts-and-culture-fourth-quarter-expenditure-report-south-african-heritage-resources-Agency-turnaround> (accessed 20/11/2013).

²²¹ PCAC 20/03/2013 <http://www.pmg.org.za/report/20130320-20122013-anticipated-audit-outcomes-Department-arts-culture-briefing> (accessed 20/11/2013).

²²² PCAC 05/09/2012 <http://www.pmg.org.za/report/20120905-south-african-heritage-resources-association-state-affairs> (accessed 20/11/2013).

²²³ PCAC on SAHRA's 2012 annual report 31/10/2012 <http://www.pmg.org.za/report/20121031-south-african-resources-Agency-their-201112-annual-report> (accessed 20/11/2013).

²²⁴ PCAC on the National Heritage Council 2011 strategic plan briefing, Committee concerns about Pan South African Language Board 14/06/2011 <http://www.pmg.org.za/report/20110615-national-heritage-Council-its-annual-report-200910> (accessed 20/11/2013).

²²⁵ PCAC on the National Heritage Council 2011 strategic plan briefing, Committee concerns about Pan South African Language Board 14/06/2011 <http://www.pmg.org.za/report/20110615-national-heritage-Council-its-annual-report-200910> (accessed 20/11/2013).

Councillor was appointed in a proper manner and another Councillor was, without the knowledge of management, given a contract to do the work that management should have been performing.²²⁶

The information above indicates that the Agency has not had an effective leadership in place. Moreover, there have been three periods during which no Council was appointed, which obviously affect an institution's effectiveness and efficiency.

4. THE ADMINISTRATIVE HARMONY

The CEO forms part of the Council.²²⁷ However, unlike other Councillors, the CEO is appointed by the Council itself.²²⁸ The CEO is also the accounting officer, responsible for the management of the Agency's affairs and must report on those affairs to the Council as may be required. In terms of Section 14 (5) of the NHRA, a Councillor holds office for a period not exceeding three years, and may be reappointed. Therefore Section 14 (5) of the NHRA also applies in respect to CEO's appointment.

At its establishment, the Agency had a transitional CEO before a full-term CEO was appointed on a five-year contract in January 2001.²²⁹ However, the CEO did not complete her contract, because by October 2004 another CEO was appointed on a five year contract. The third appointee also left the Agency eighteen months before his contract expired.²³⁰ An acting CEO was appointed from April 2008 to January 2009. In February 2009, a new CEO was appointed by Council on a three-year term, which she later argued to have been verbally extended to five years.²³¹ In November 2012 an acting CEO was appointed.²³²

²²⁶ PCAC on the National Heritage Council 2011 strategic plan briefing, Committee concerns about Pan South African Language Board 14/06/2011
<http://www.pmg.org.za/report/20110615-national-heritage-Council-its-annual-report-200910>
(accessed 20/11/2013).

²²⁷ Section 14 (1) (b) NHRA.

²²⁸ Section 20 (1) NHRA.

²²⁹ SAHRA's annual report 2002 –2003 4.

²³⁰ SAHRA's annual report 2004 –2005 6.

²³¹ SAHRA's annual report 2011-2012 16.

²³² SAHRA's annual report 2012-2013 15 and 51.

In 2012, the then CEO challenged the expiration of her three-year term of office, on the basis that there was a verbal undertaking by the previous Council that it would be for five years. During her term of office, the CEO did not have a performance contract but only an employment letter.²³³ When the Council tried to obtain the contract, appeals were made to the Minister of Arts and culture, and the Council was reported to the Public Protector with a request that it stop investigating the validity of her contract of employment.²³⁴

During the period 2000 to 2013 several trends have developed within the Agency. The NHRA states that all Councillors, which include the CEO, are appointed on a three-year term, but the employment contracts of all CEOs (to the exclusion of acting CEOs) have stipulated a five-year term, which is contrary to the three-year term mentioned in the Act.

None of the Agency's CEOs have ever completed a full-term in office. There is no stability in the CEO's office, and there have been several acting CEOs who come in and out of office without proper official handover. These events are clear indication of instability in the office of the CEO, which affects institutional performance.

Although a single occurrence, the verbal promise of job security to the CEO without going through the proper channels is worrying. Furthermore, the Agency's recruitment process is questionable, considering the fact that the former CEO was the only candidate shortlisted for the job.²³⁵

5. ECONOMICAL AND EFFICIENT USE OF RESOURCES

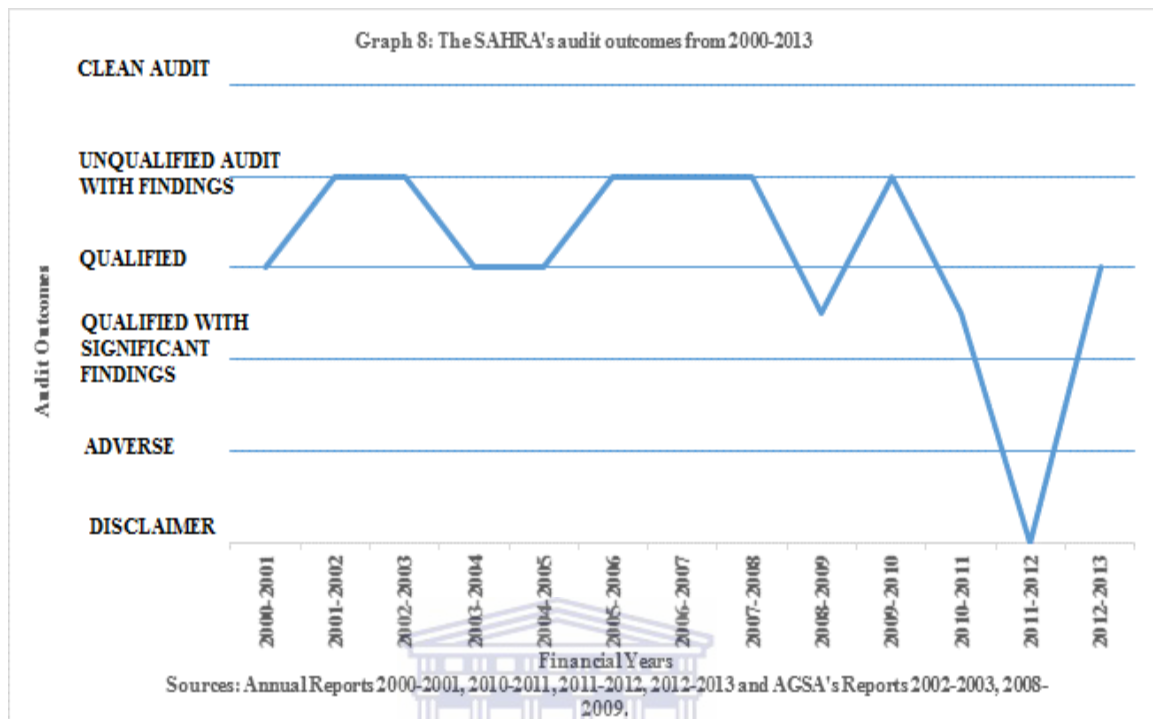
Graph 8 below illustrates SAHRA's audit outcomes for the period 2000 to 2013. The vertical axis represents audit outcomes received for each financial year. The horizontal

²³³ PCAC 05/09/2012 <http://www.pmg.org.za/report/20120905-south-african-heritage-resources-association-state-affairs> (accessed 20/11/2013).

²³⁴ PCAC 31/10/2012 <http://www.pmg.org.za/report/20121031-south-african-resources-Agency-their-201112-annual-report> (accessed 20/11/2013).

²³⁵ PCAC 05/09/2012 <http://www.pmg.org.za/report/20120905-south-african-heritage-resources-association-state-affairs> (accessed 20/11/2013).

axis represents the financial years. The audit outcomes are indicated by the thick blue line across the graph.



Graph 8: The SAHRA's audit outcomes from 2000-2013.

As indicated by graph 8 above, the Agency has never received a clean audit. The main reason for this has been non-compliance with laws, regulations and guidelines.

The AGSA's findings reveal a general pattern of lack of documentation provided for auditing purposes. In circumstances where documentation is disclosed, its validity, accuracy and completeness cannot be verified.²³⁶ Therefore, it is impossible to obtain sufficient appropriate audit evidence to support the amounts stated in most of the financial statements.

Since the Agency's inception, its major weaknesses have been its inadequate internal controls, management of compliance systems,²³⁷ the non-establishment of a system of internal audit under the control of an audit Committee,²³⁸ non-compliance with guidelines

²³⁶ SAHRA's annual report 2003-2004 51.

²³⁷ SAHRA's annual report 2000-2001 20.

²³⁸ Section 51 (1) (a) (ii) PFMA.

that pertains to procurement, contract and the supply chain management,²³⁹ non-disclosure and classification of information as per guidelines,²⁴⁰ material misstatements in all financial statements in the form of under-statement and over-statement of figures²⁴¹ and the late submission of financial statements.²⁴²

For several years, the Agency had irregular, fruitless, wasteful²⁴³ and unauthorised expenditure, as a result of not having a staff member who could monitor and control supply chain management procedures.²⁴⁴

Ultimately, in 2011-2012, SAHRA obtained a disclaimer because the shortcomings and weaknesses from the past years had not been dealt with, and there had been the absence of a Council in previous years. The Agency provided insufficient evidence in the form of documentation on which the AGSA could base an audit opinion. The lack of sufficient evidence was not confined to specific amounts but represented a substantial portion of the information in the financial statements.²⁴⁵

The AGSA's assertion that supporting documentation had not been forthcoming from the Agency has also been confirmed by the Chairperson of the PCAC during one of the Parliamentary meetings.²⁴⁶ It was indicated that the PCAC's request from SAHRA for documentation on mismanagement of funds, for the purpose of oversight was not forthcoming.

²³⁹ SAHRA's annual report 2003–2004 51-52.

²⁴⁰ Sections 55 (1) (a) and 55 (1) (b) PFMA.

²⁴¹ AGSA's report 2007–2008 187.

²⁴² AGSA's report 2002–2003 68.

²⁴³ SAHRA's annual report 2010–2011 120-122.

²⁴⁴ SAHRA's annual report 2010–2011 120.

²⁴⁵ SAHRA's annual report 2011–2012 136.

²⁴⁶ PCAC on War Museum of Boer Republics, National Film and Video Foundation, Robben Island Museum: 2013 annual performance plans 22/05/2013 <http://www.pmg.org.za/report/20130522-war-museum-boer-republics-national-film-video-foundation-robben-island-museum-2013-annual-performance-plans> (accessed 20/11/2013).

6. MANDATE EXECUTION

It has been acknowledged²⁴⁷ that SAHRA has battled to implement the NHRA.²⁴⁸ Reasons such as the enactment of the NHRA without considering the financial implications, the insufficiency of funding,²⁴⁹ and the broadly defined legislation have been put forward as justifications for the unsuccessful implementation.

In this regard, an assessment of decisions made on the identification and declaration of national heritage sites, on the issuing of permits as well as on appeals and capacity assessments is undertaken as shown in graph 9 below. The horizontal axis represents the financial years and the vertical axis represents the number of decisions made on the Agency's mandate per financial year.



²⁴⁷ PCAC on the briefing by SAHRA on the NHRA 16/08/2002

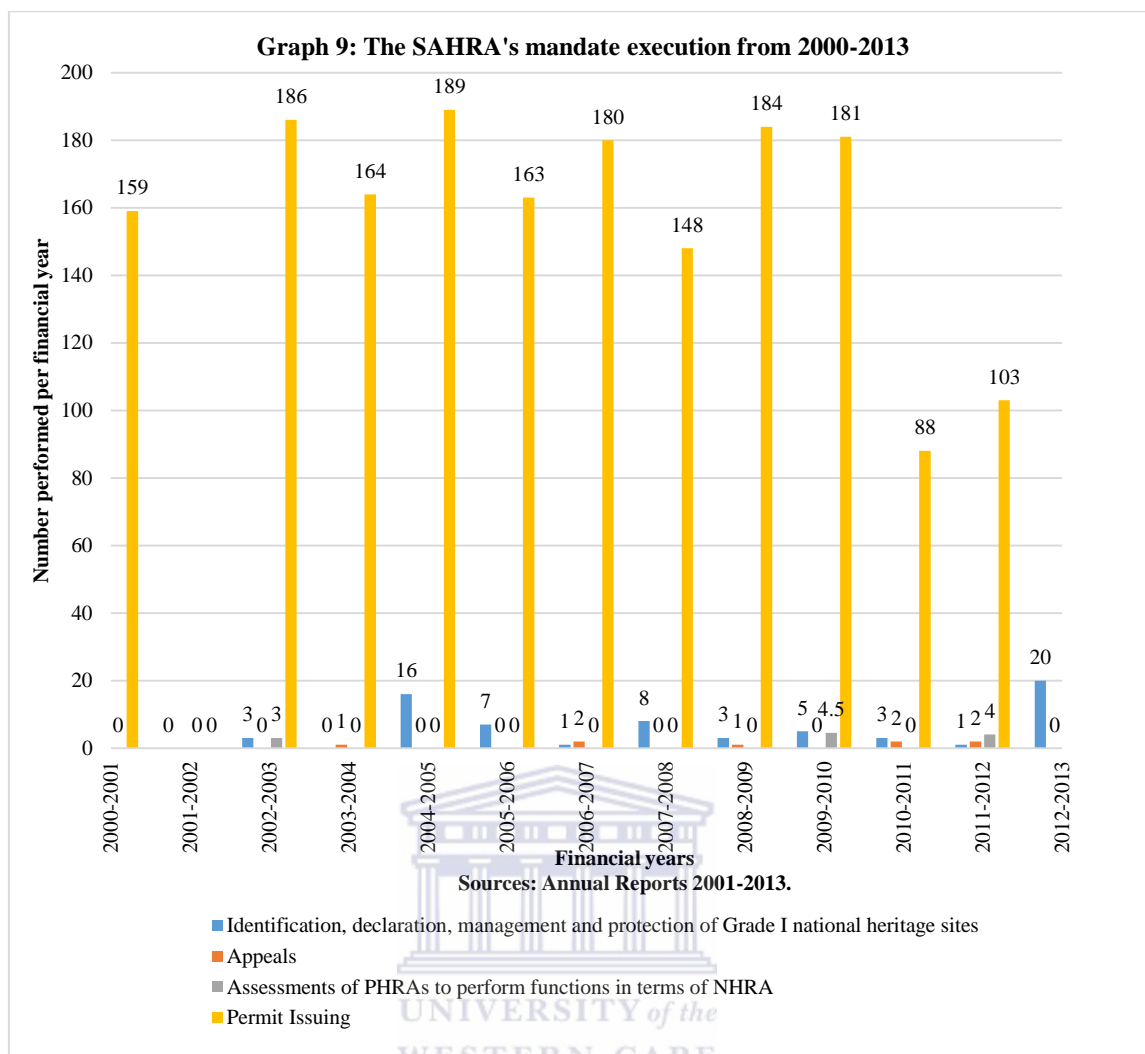
<http://www.pmg.org.za/minutes/20020815-briefing-south-african-heritage-resource-Agency-national-heritage-resources-act>
(accessed 20/11/2013).

²⁴⁸ PCAC on SAHRA's annual report for the year ended 31 March 2001 05/03/2002

<http://www.pmg.org.za/minutes/20020304-south-african-heritage-resource-Agency-annual-report>
(accessed 20/11/2013).

²⁴⁹ PCAC on the presentation by the Department on its budget 2010-2011 23/03/2010

<http://www.pmg.org.za/report/20100324-Department-arts-culture-its-budget-2010-11>
(accessed 20/11/2013).



Graph 9: The SAHRA's mandate execution from 2000-2013.

Unlike the FFC and MDB, the Agency does not operate on a yearly reporting basis. The Agency's mandate is influenced and/or triggered by an event. As an example, the permit issuing, appeals and assessments of PHRAs to perform their functions occurs on request by an applicant. However, the identification, declaration, management and protection of grade I heritage sites is a function that must be performed routinely.

Overall, graph 9 reflects that, of the four mandates assessed, the issuing of permits was undertaken on an annual basis. However, graph 9 should be read with caution, because execution of mandate cannot occur when there is no Council in place, as was indicated earlier by graph 7 above.

According to the Agency's 2004–2005 annual report, in 2005 all nine PHRAs had been established. However, the PHRAs were not fully functional and not in a position to

execute some of their tasks. At present only two PHRAs are fully functional, while others are either completely understaffed, under-trained or lacking the staff contingent to deal with all aspects of the NHRA. At the present moment, only the City of Cape Town metropolitan municipality has applied to its PHRA for powers over grade III heritage resources.²⁵⁰

During the period 2007/2008 appeals were lodged with SAHRA but because no new members of Council had been appointed since 30 September 2006 the appeals could not be concluded. The consequences of the inability to make decisions included a lapse of SAHRA's provisional protection of the heritage resource, resulting in loss of formal jurisdiction over certain of farms. These affected the appellants' ability to obtain decisions that would enable them to proceed with the developments, because SAHRA's appeal Committee was non-existent for more than a year after the appeals were lodged.²⁵¹

With regard to the identification, declaration, management and protection of Grade I heritage sites, during 2007/2008, a delay in the declaration of the Table Mountain National Park as a national heritage site, was caused by the late appointment of SAHRA's Council.²⁵² In addition, the declaration of District Six as a national heritage site was delayed because there was no Council to finalise the formal processes linked to gazetting, which is led by SAHRA.²⁵³

The available data and information indicates the Agency's total failure to execute its mandate. It can be argued that SAHRA's inability to provide services and its non-responsiveness to the public has affected its ability to assess PHRAs' ability to perform and thus it has also prevented local heritage authorities from performing their functions.

²⁵⁰ Wiltshire NG *The use of SAHRIS as a state sponsored digital heritage repository and management system in South Africa* International CIPA Symposium, 2-6 September 2013, Strasbourg, France 325.

²⁵¹ SAHRA's annual report 2007–2008 99.

²⁵² SAHRA's annual report 2007–2008 94.

²⁵³ District Six Museum's annual report 2007–2008 7.

7. CONCLUDING REMARKS

The above information reflects a disregard for procedures and guidelines. This can be traced back to the institution's lack of an internal audit unit to deal with internal controls, and other weaknesses in the system and management.

SAHRA's situation is evidence of regression in effective leadership,²⁵⁴ and of non-productive relations between the Council and the CEOs office. This is manifested by the uneconomical and inefficient use of resources. It is a combination of poor governance and operations.

The Agency has been built on an institutional culture of poor performance, lack of accountability and disorder without consequences. On the other hand, there is merit in the argument that SAHRA's problems may be a reflection of the bigger problems within the Department.

From the look of things, the tension and conflicts between the Councillors and the CEO is affecting the Agency's ability to execute its mandate as reflected by graph 9 above. This means that the clear lack of proper dialogue between the three heritage authorities, which is reflected by the challenge of getting provincial representatives into the SAHRA Council, amongst others, hampers the decentralisation of power to PHRAs and local heritage authorities.²⁵⁵ Clearly, the assessment and verification of provincial and local government's competence to perform functions before devolution, was not undertaken during the absence of a Council in office. As shown, currently only one municipality has applied to its PHRA for powers over Grade III heritage resources and two out of nine PHRAs are fully functional.²⁵⁶

²⁵⁴ SAHRA's annual report 2011–2012 110.

²⁵⁵ Peters BG and Pierre J (2001): 29 134, Stephenson P 'Twenty years of multi-level governance: 'where does it come from? what is it? where is it going?' (2013) 20 *Journal of European Public Policy* 819.

²⁵⁶ Wiltshire NG (2013) 325.

CHAPTER 6: CONCLUSION AND RECOMMENDATIONS

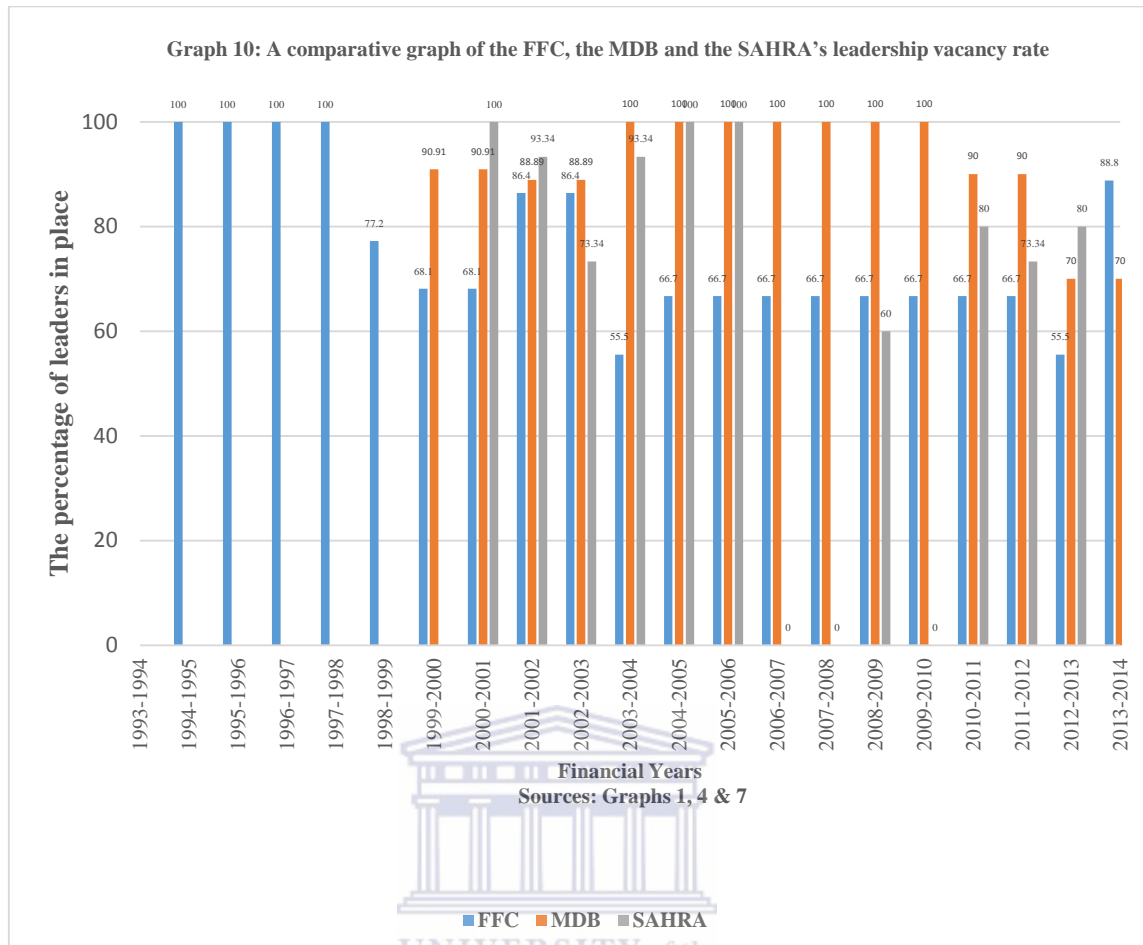
1. INTRODUCTION

This paper focused on good governance within the FFC, the MDB and the SAHRA, state institutions which are meant to support South Africa's system of multi-level government. In doing so, the elements of good governance were grouped into four thematic areas, namely; effective leadership, administrative harmony, economical and efficient use of resources and mandate execution. Using these themes, an assessment of the state institutions' effectiveness and efficiency was undertaken. This Chapter provides a summary of the key trends observed throughout this assessment, followed by remedial recommendations.

2. CONCLUSION

Addressing the functionality of a state institution can only be possible if there is a system which monitors trends and occurrences. The monitoring encompasses availability of complete data, which is consistent, valid and accessible to all members of society. However, in the process of compiling this paper, data given by institutions and information contained in the annual reports was mostly inaccurate and incomplete.

Regarding effective leadership, a comparative graph 10 below, with 100 per cent representing a full composition of leaders and nought per cent representing an absent of leaders, indicates that at various stages all three institutions were operating with the minimum required number of leaders, thereby affecting the effectiveness of these institutions.

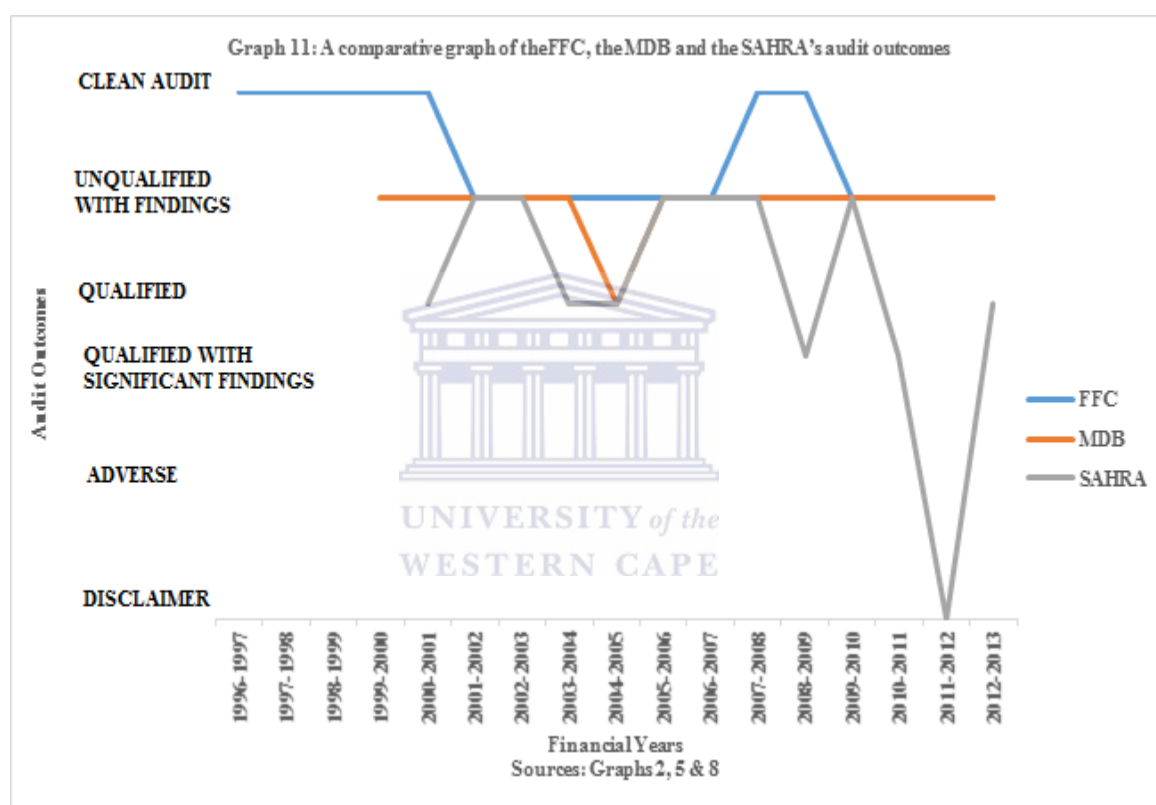


Graph 10: A comparative graph of the FFC, the MDB and the SAHRA's leadership vacancy rate.

SAHRA has had three periods where no Council was appointed. Unlike the FFC and MDB, there were more resignations and vacant positions at SAHRA and the relationship between the Agency's Councillors was found to be generally unproductive and marred by conflicts. There is a prevalence of appointing leaders on an acting basis at the FFC for extended periods.

With regard to administrative harmony, the FFC operated on combined CEO/Chairperson roles in violation of the principles of good governance, but SAHRA had a clear separation of the two positions. At one point, the MDB appointed one of its own part-time Board member as an acting CEO at the same time. However, there was stability, continuation and harmonious relationship between the CEOs and the Board at MDB than at SAHRA.

In respect of economical and efficient use of resources, as shown on graph 11 below, all three institutions have had limited clean audits. The main barrier to achieving clean audits was an inability to comply with laws and regulations. In the case of the FFC, there were minor issues, whereas SAHRA had an extreme case of non-compliance, as reflected by AGSA's disclaimer audit. Overall, major institutional weaknesses were found on internal controls and systems which violated provisions of the PFMA, treasury regulations, supply chain management and preferential procurement frameworks, which resulted in unauthorised, irregular, fruitless and wasteful expenditure.



Graph 11: A comparative graph of the FFC, the MDB and the SAHRA's audit outcomes.

With regard to the mandate execution, it was found that throughout the three institutions' existence, only the FFC was able to execute its entire mandate. The MDB delivered on its constitutional mandate, but not on its statutory mandate and SAHRA did not execute its mandate.

2.1 Overall findings

The problems faced by the institutions are influenced by both external and internal factors. In the case of external factors, the prevailing vacuum in leadership in the case of non-appointment and a combination of CEO/Chairperson roles which fall within the mandate of institutional designers or executive authorities, is concerning.

However, as this study was not about external factors, but rather internal governance in state institutions, the overall findings were as follows:

It was found that at SAHRA, the institutional flow as depicted by figure 2 in Chapter 2 is disconnected. The intention (mandate execution) of the institutional designer as reflected in the National Heritage Resources Act 25 of 1999, was not implemented. Internal factors such as conflicts between the Councillors and the CEO, also added to the disturbance of the institutional flow. This resulted in an environment which was not conducive or receptive to the elements of good governance. Of concern, is that over the years, several forensic audit reports were undertaken at SAHRA, but no further steps were taken against the culprits.²⁵⁷

However, even with problems with the appointment of leaders and the CEO/Chairperson combination at the FFC, both the FFC and the MDB were able to facilitate the MLG system.

How has bad governance influenced the mandate execution and how did it impact on the functioning of the intergovernmental relations system? In the absence of the elements of good governance, which are meant to be constraints, checks and balances, there was an increase in unauthorised, irregular, fruitless and wasteful expenditure which resulted in weak institutions such as SAHRA. As a result, the allocated public resources were not directed to the execution of mandate, thus the non-facilitation of the MLG system, as evidenced by the non-operational and non-functional PHRAs and local heritage authorities.

²⁵⁷ SAHRA's annual report 2005–2006 107-108.

3. RECOMMENDATIONS

Certain recommendations can be made to improve the effectiveness and efficiency of state institutions to facilitate the MLG system. The recommendations seek to ensure that stringent measures are adopted in the appointment processes in order to minimise conflicts, leadership vacuum and non-compliance with laws and regulations. The measures must ensure that state institutions are able to function according to the principles of good governance.

Stringent measures must be put in place to ensure that at least annual reports of the institutions' state of affairs are accurate and have complete information. This recommendation is made in light of the difficulties experienced by the author in collecting data needed to analyse good governance at SAHRA and, to a degree, at the MDB and the FFC.

Furthermore, the various Parliamentary Committees should be involved in the process of appointing leaders in state institutions. This will strengthen the elements of good governance, specifically accountability, transparency and the promotion of the right of access to information.²⁵⁸ It will also strengthen Parliament's oversight role, and promote accountability to the office rather than to an individual, leading to the strengthening of the independency of state institutions.

The executive authorities should be proactive in remedying the ills by enabling legislation that facilitates the institution to function effectively and efficiently. The Acts should set clear criteria and time limits on how, when and how long a position should be vacant. The provisions should be stated in a clear and mandatory language to ensure compliance.

The main goal of the MLG system is to improve service delivery to the public through the three spheres of government. Without the support of state institutions in facilitating and assisting the MLG system, the three spheres cannot function optimally in the delivery of good and services. If the institutions that are meant to facilitate MLG system are unable to operate efficiently, the objectives of devolution will be negatively affected.

²⁵⁸ Section 32 Constitution.

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