



INSTITUTIONAL TENSIONS BETWEEN MUNICIPAL CHAIRPERSONS AND EXECUTIVES

SPEAKING OF MAYOR CONFLICTS?

Research Paper

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1 INTRODUCTION AND CONTEXT

During his presentation of the audited results of the 2006/2007 financial year, the Auditor General, Mr Terence Nombembe, made it absolutely clear that good governance is key to the proper functioning of municipalities: “If you don’t have political stability, then you won’t get proper financial accountability. It will have an impact on the financial results”.¹

This is but one of the many testimonies to the importance of sound governance arrangements and sound government practice at municipal level. Considering the fact that the comment was made in the context of 60% of all municipalities not being able to give evidence to account for spending, only a quarter receiving unqualified audit opinions and one-third of municipal spending being branded “fruitless and wasteful expenditure” it becomes clear there are serious problems in those municipal governance arrangements and practices.²

This paper focuses on a particular aspect of municipal governance arrangements and practice, namely the office of the speaker and the implications of this office being introduced into municipal governance in South Africa in 2000. It provides an analysis of the tensions that have arisen from the introduction of this office and the roles and functions designated or permitted to it by the Local Government: Municipal Structures Act, 117 of 1998 (“Municipal Structures Act”) and the Local Government: Municipal Systems Act, 32 of 2000 (“Municipal Systems Act”). The experience of the last seven years has shown that the relationship between the office of the speaker and the office of the mayor has the potential to be fraught with tension. For example, at SALGA’s Annual Conference in 2007, the lack of clarity between the roles of the two office-bearers was highlighted.³ An earlier study found the relationship between speakers and mayors to be poor: “Self-defeating patterns of behaviour characterise interaction between the executive mayor and the speaker. Both act in a way that is detrimental to themselves and the municipality and there is little understanding and concern about the consequences of the poor relationship between them and the negative impact this has on the municipality.”⁴ It is on this relationship that this paper focuses primarily.

The first part of this paper provides a short overview of the evolution of the speaker in local government. The second part discusses the constitutional and statutory framework governing these two political office bearers. Following this, a comparison is drawn between these political offices and their corollaries in the national and provincial spheres. The analysis of the contrast between political offices at the municipal sphere and their national and provincial counterparts is situated within a theoretical analysis of the separation of powers doctrine. The third part of the paper outlines the manifestations and

¹ Mandy Rossouw “Local govt’s spending black hole”, *Mail & Guardian* 20-26 June 2008.

² Mandy Rossouw “Local govt’s spending black hole”, *Mail & Guardian* 20-26 June 2008.

³ South African Local Government Association (2007) *SALGA National Conference 2007* (Pretoria, SALGA) 39.

⁴ Idasa “Municipal Governance: Working of the Mayoral Executive System” Pretoria: Hologram Research Papers (www.ksp.org.za, accessed 18 July 2008) section 2.

reasons for conflict between the two political office bearers, with reference to the systems of delegations of a number of municipalities as an illustration of how municipalities have attempted to delineate roles for each political office bearer.

The final part of this paper outlines a range of options for addressing the tensions that result from the interaction between these offices, and assesses the feasibility and practicability of each option.

2 HISTORY OF CHAIRPERSON OF COUNCIL

The local government election of 5 December 2000 inaugurated the final phase of local government transition, a process that commenced in 1993 when the Local Government Transition Act, Act 209 of 1993 (“LGTA”) was negotiated alongside the interim Constitution. The transformation of local government occurred in three phases. The first, pre-interim phase commenced with the coming into operation of the LGTA and the establishment of the negotiating forums in local authorities pending the first local government election. The second phase began when the first local government elections were held in 1995/1996, establishing integrated municipalities although these were not yet fully democratically elected. The third and final phase commenced with the local government election on 5 December 2000, establishing the current municipalities. Underpinning the transition process were the interim Constitution of 1993 and the final Constitution of 1996.⁵

The office of the speaker was introduced into local government for the first time with the onset of formal democratic local government in 2000. During the pre-interim and interim phases, there was no such office-bearer in local government. The LGTA made no provision for a speaker and the issue was thus left to the legislation that existed prior to the onset of the transition. During the pre-interim and interim phases, the internal functioning of municipal councils was largely governed by local government ordinances that had been adopted in the four provinces prior to 1994. The Cape Ordinance,⁶ for example, made no reference to a speaker. The designated office bearers were simply the mayor and deputy mayor. It provided in section 51(5) that “the mayor shall be chairman of every meeting of the council.” Section 49(1) provided that whenever the office of the mayor is vacant or the mayor is absent, “the deputy mayor shall exercise the powers and perform the duties and functions conferred and imposed on the mayor...” In the event that both the mayor and deputy mayor were absent, a councillor was appointed by council to assume the chairperson’s duties.

Clearly, no great emphasis fell upon the chairperson in the transitional arrangements since they had no specific powers or a casting vote. It is safe to say that before 2000, the role of a mayor was limited to chairing council meetings, performing ceremonial functions and performing all other functions currently assigned to the speaker.

⁵ Steytler & De Visser *Local Government Law of South Africa* 2007 LexisNexis: Durban 1-10.

⁶ Cape Municipal Ordinance (Ordinance 20 of 1974).

The establishment of the office of speaker was thus a notable governance related reform introduced in 2000. The policy rationale for introducing the office of a speaker in local government did not appear in any official policy document. The White Paper on Local Government⁷ is also silent on the issue of a speaker in local government; it made no reference to such a functionary. Steytler and De Visser opine that “the introduction of the speaker was informed by the wish to establish a framework for municipalities to entrench mechanisms for ensuring oversight, accountability, integrity, discipline of office, and the efficient running of council meetings”.⁸

However, tensions were evident as early as 2001. For example, a departmental document in the North West province stated that “one of the issues that need to be dealt with as a matter of urgency is the clarification and synchronisation of the role of mayors and speakers in the whole system. Just a few months after the establishment of new municipal structures, there are already signs of confusion and problems regarding this subject in many councils”.⁹ It goes on to say that “speakers and mayors are the main drivers of the local government system. A proper collaboration and synchronisation of their roles is an indispensable ingredient for an effective, efficient and functional municipal council... Whilst noting the distinctive roles and responsibilities that each party has to play, those roles should not be seen in contrast with each other but in relation to how it [sic] can and should contribute to the overall success of the council”.

Thus, the introduction of a speaker in local government was set to become a simmering pot of tension. The absence of an explicit prior policy rationale for the introduction of this office may have contributed to this. Indeed, as will become clear in the next part of this paper where the constitutional and statutory framework for the speaker is discussed, little legislative guidance was provided to this new office.

3 CONSTITUTIONAL AND STATUTORY FRAMEWORK

3.1 Speaker

The Constitution creates local government as a distinctive sphere of government vested with the authority to govern its own affairs, subject to national and provincial legislation permitted by the Constitution.¹⁰ In contrast to the constitutional provisions for the election of a speaker in the National Assembly and provincial legislatures, the Constitution does not make specific provision for a speaker in local government.

According to section 160(1)(b) of the Constitution “A Municipal Council...must elect its chairperson”. However, the Constitution does not stipulate the specific roles or functions of that chairperson. To the extent that the Constitution is silent on the detail, it becomes

⁷ Department of Constitutional Development *White Paper on Local Government* 1998.

⁸ Steytler & De Visser *Local Government Law of South Africa* 2007 LexisNexis: Durban 3-7.

⁹ *Framework for allocating functions and responsibilities to speakers and mayors and managing their activities to ensure that they contribute to the overall functioning and effectiveness of municipal councils: The North West Perspective* (Office of MEC, North West), 30 July 2001.

¹⁰ S 151 Constitution.

the responsibility of the national and provincial government, pursuant to their authority under section 155 and 160(5) of the Constitution, to clarify the internal structures of local governments.

Pursuant to this authority, the national government passed the Municipal Structures Act and the Municipal Systems Act. Section 36 of the Municipal Structures Act interprets section 160(1)(b) of the Constitution by naming the chairperson to be elected by the municipal council as the speaker. The sections that follow section 36 provide further direction on the election and role of the speaker. The speaker is elected by the members of the municipal council at their first sitting after a municipal election or whenever necessary to fill a vacancy.¹¹

It is important to note that section 160(1)(b) of the Constitution merely instructs each municipal council to elect “a chairperson”. The implementation of this provision in the Municipal Structures Act has resulted in a separation of the chairperson of the council from the mayor; in nearly all municipalities, the chairperson is called a ‘speaker’ and is not the same person as the mayor. This is not the inevitable consequence of section 160(1)(b) of the Constitution; the lawmakers could have opted to collapse the chairperson and the mayor into one office, as was the situation in local government prior to the Structures Act. The fact that, in some instances (the so-called ‘plenary-type’ municipalities), the two offices are combined bears testimony to this.¹²

Section 37 of the Structures Act specifies the functions of the speaker as follows:

The speaker of a municipal council –

- (a) presides at meetings of the council;
- (b) performs the duties and exercises the powers delegated to the speaker in terms of section 59 of the Local Government: Municipal Systems Act, 2000 (Act No. 32 of 2000);
- (c) must ensure that the council meets at least quarterly;
- (d) must maintain order during meetings;
- (e) must ensure compliance in the council and council committees with the Code of Conduct set out in Schedule 1 to the Local Government: Municipal Systems Act, 2000 (Act No. 32 of 2000); and
- (f) must ensure that council meetings are conducted in accordance with the rules and orders of the council.

In accordance with the speaker’s role as chairperson of council, the speaker is authorised to decide when and where council meets.¹³ However, if a majority of councillors requests the speaker in writing to convene a council meeting, the speaker must convene a special

¹¹ S 36(2) Structures Act.

¹² Steytler & De Visser *Local Government Law of South Africa* 2007 LexisNexis: Durban 2-23, 3-8.

¹³ S 29(1) Structures Act.

meeting at the time set out in the request.¹⁴ Section 37 of the Structures Act contains the most comprehensive statutory allocation of functions to the office of the speaker. While the statutes do not define the exact boundaries of the speaker's role, the statutory functions of the speaker generally relate to the administration of council and council's committees. However, the reality is that speakers (and other office bearers) derive much of their authority from delegations pursuant to section 59 of the Systems Act.¹⁵

3.2 Mayor

The role of a mayor is dependent on whether the municipality is of a collective executive type, executive mayoral type or plenary executive.¹⁶ Municipalities of the collective executive type elect a 'non-executive' mayor from among the members of its executive committee,¹⁷ while municipalities of the executive mayoral type elect an executive mayor from among the councillors.¹⁸ Municipalities of the plenary executive type have neither an executive committee nor an executive mayor and they do not elect a mayor. Instead, the speaker is called the mayor.¹⁹

The non-executive mayor's statutory role is mostly ceremonial. He or she decides when and where the executive committee meets²⁰ and chairs meetings of the executive committee.²¹ However, the municipal council or the executive committee may delegate additional powers to the non-executive mayor.²² It is these delegated powers that really define the role of the non-executive mayor.

The executive mayor has the most robust range of statutorily defined functions. Amongst other things, the executive mayor is involved in identifying the needs of a municipality and making recommendations to the municipal council on strategies for addressing those needs.²³ The executive mayor oversees the municipality's administration²⁴ and oversees the provision of services to communities.²⁵ He or she receives reports from the various committees of council and forwards such reports to council with recommendations when the executive mayor cannot resolve the matter in terms of her or his delegated powers.²⁶

¹⁴ S 29(1) Structures Act.

¹⁵ Delegations will be considered in the next section of this paper.

¹⁶ S 7 Structures Act.

¹⁷ S 48 Structures Act.

¹⁸ S 55 Structures Act.

¹⁹ S 55 Structures Act.

²⁰ S 50 Structures Act.

²¹ S 49 Structures Act.

²² S 49(1)(b) Structures Act.

²³ S 56(2)(a) and (c) Structures Act.

²⁴ S 6(3)(d) Structures Act.

²⁵ S 56(3)(e) Structures Act.

²⁶ S 56(1) Structures Act.

In essence, the Municipal Structures Act posits the executive mayor as the political head of the municipality. The Act provides the office with significant functions of oversight over the workings of the municipality and control over strategic planning.²⁷ Again, the detail of the executive mayor's powers is determined in a municipality's delegation policy where specific executive or administrative powers are allocated to the executive mayor. However, these policies usually delegate significant powers to the executive mayor.

While this paper acknowledges the real distinctions between the office of the executive mayor and the non-executive mayor in municipalities, these distinctions are not the primary focus of this paper and are not explored in the relationship with the speaker. The tensions between the speaker and the mayor arise in both scenarios i.e. with an executive or non-executive mayor.

The presence of both the speaker and mayor in a municipal council without exhaustive statutory directives on the boundaries of their roles and their relationship to one another has resulted in two separate seats of power within municipal councils. Both the mayor and the speaker are elected by the members of council and both (usually) hold full-time seats. In reality, however, the mayor has a much stronger public mandate based on his or her political ranking, the election campaign and visibility to the public. The mayor has the broadest scope of responsibilities and functions under both the Structures Act and the Systems Act. Additional roles and responsibilities are also assigned to the mayor in other legislation such as the Local Government: Municipal Finance Management Act, Act 56 of 2003 ("MFMA"). The MFMA requires the mayor to "provide general political guidance over the fiscal and financial affairs of the municipality".²⁸ The statutory functions delegated to the speaker are less comprehensive in scope.

Both office bearers obtain a significant portion of their authority from delegations by the municipal council pursuant to section 59 of the Systems Act. However, before the delegations can be discussed, an excursion into the legal framework for the 'terms of reference' for office-bearers is necessary.

3.3 Terms of Reference

Section 53 of the Municipal Systems Act instructs a municipality to define the "specific role and area of responsibility for each political structure and political office bearer of the municipality." Section 1 of the Systems Act defines "political office bearers" to include the Mayor, the Executive Mayor, the Deputy Mayor and the Speaker. The roles and responsibilities must be defined in precise terms by way of separate terms of reference for each structure, office bearer and the municipal manager. The terms of reference must be reduced to writing, and must define the following:

- (a) relationships among the structures, office bearers and the municipal manager, and the manner in which they must interact;
- (b) appropriate lines of accountability and reporting;

²⁷ S 56(3)(f) Structures Act.

²⁸ S 52(a) MFMA.

- (c) mechanisms, processes and procedures for minimising cross-referrals and unnecessary overlapping of responsibilities;
- (d) mechanisms, processes and procedures for resolving disputes between structures, office bearers and the municipal manager;
- (e) mechanisms, processes and procedures for interaction between
 - the political structures, political office bearers and the municipal manager and
 - other staff members; and
 - councillors and the municipal manager and other staff members.

The municipality is obliged to acknowledge and give effect to these terms of reference in its rules and procedures, instructions, policy statements and other written instruments.²⁹ The terms of reference are distinct from the delegation of power. They do not in themselves confer any public power on a political structure, office bearer or official. They function as an internal management instrument in that they clarify the location of the person or structure within the municipal organisation and outline the linkages with other office-bearers, structures and officials.³⁰ They can provide for organisational protocols such as the frequency and method of reporting and protocols for the resolution of disputes.

3.4 Delegation

It is through delegation that the municipality implements the terms of reference of political office-bearers such as the mayor and the speaker. Section 59 of the Municipal Systems Act instructs the municipality to develop a system of delegation that will “maximise administrative and operational efficiency and provide for adequate checks and balances”. This system may delegate powers (excluding certain ‘non-delegable’ powers³¹) to political structures, political office-bearers, councillors or staff members.

It is clear from the wording of section 59 that efficiency is intended to be a key goal for municipalities in delegating functions to political office bearers and other municipal functionaries.

3.5 Assessing the legal framework

It is apparent from the legal framework that municipalities are instructed to carefully define the roles of office-bearers and couple those roles with the concomitant executive and administrative powers. It is also apparent that the legal framework anticipates conflicts and tensions between political office-bearers. Municipalities are instructed to create a terms of reference for each office-bearer which is intended to avoid conflicts and provide for conflict resolution if conflicts do arise.

²⁹ S 53(2)(b) Systems Act.

³⁰ Steytler & De Visser *Local Government Law of South Africa* 2007 LexisNexis: Durban 8-12.

³¹ Steytler & De Visser *Local Government Law of South Africa* 2007 LexisNexis: Durban 8-14.

The fact that section 59 affords municipalities the authority to delegate powers to individual councillors adds an important dimension to the analysis of the sources of conflict between municipal office bearers. It allows the council to allocate functions to individuals who are not identified as political office bearers within the definition provided in section 1 of the Systems Act. In essence, a municipal council may, by delegation, create additional seats of power in a municipality. Of most significance in this regard is the inclusion of the ‘chief whip’ or ‘council whip’ in the system of delegations.

4 SEPARATION OF POWERS

4.1 Introduction

The juxtaposition of the speaker and the mayor inevitably brings up the issue of separation of powers as the offices are linked, at least at face value, to the legislative and the executive branch respectively. An excursion into the separation of powers doctrine is thus instructive for the purpose of understanding a traditional role of a speaker and for the purpose of ironing out a more detailed role for the speaker vis-à-vis the mayor in the municipal context.

The principle of separation of powers ensures the independence of branches of government. The principle of checks and balances, which is linked to, and made possible by the implementation of, the principle of separation of powers prevents the unnecessary centralisation of power in any one individual or office.³² Separation of powers may also facilitate an expedient division of labour; the creation of more seats of power is efficient as it allows the development of different areas of expertise.³³

4.1.1 Separation of powers in the national and provincial sphere

Section 52 of the Constitution provides for the election of the Speaker of the National Assembly and section 111 provides for the election of a speaker in the provincial legislature. The conceptualisation of their roles is facilitated by the separation of legislative and executive roles at provincial and national level.

In its *First Certification* judgment, the Constitutional Court, in addressing the question of separation of powers at the national and provincial spheres specifically acknowledged that “no constitutional scheme can reflect a complete separation of powers: the scheme is always one of partial separation... the areas are partly interaction, not wholly disjointed.”³⁴ Nevertheless, it is apparent that the legislative and executive roles at national and provincial level are pronounced and identifiable:

³² *In re: Certification of the Constitution of the Republic of South Africa, 1996* 1996 (10) BCLR 1253 (CC) para. 109.

³³ E. Dana Durand, “Council Government v Mayor Government”, *Political Science Quarterly*, Vol. 15, No. 4 (Dec., 1900), pp. 675-709.

³⁴ *In re: Certification of the Constitution of the Republic of South Africa, 1996* 1996 (10) BCLR 1253 (CC) para. 109 (footnote omitted).

- National and provincial executives are vested with executive powers only. While they propose or prepare and initiate legislation,³⁵ the function of enacting legislation is the exclusive purview of the legislative arm of government.³⁶
- As a further manifestation of separation of powers in the national sphere of government, the President ceases to be a member of the legislature once he or she is elected in that position.³⁷ A provincial premier, however, remains a member of the provincial legislature.

Consequently, the speaker at national and provincial level presides over an institution that is fundamentally different in purpose from the executive, despite the overlaps that exist between the two institutions. There is thus limited room for conflict over functional terrains between a national or provincial speaker on the one hand and the President or a premier on the other. The speaker does not preside over the executive. Nationally, the President is not even part of the legislative body, which is headed by the speaker. Even though a premier is part of the provincial legislative body, the provincial speaker never presides over, or is part of over executive decision making.

4.1.2 Separation of powers at local level?

At municipal level, situation is more complex. The Constitution does not separate legislative and executive roles at local government level. The Constitutional Court termed the local government system “a hybrid one”.³⁸ Section 151(2) of the Constitution provides that the executive and legislative authority of a municipality is vested in its municipal council. Consequently, the council makes decisions concerning the exercise of all the powers and the performance of all the functions of the municipality, as provided in section 160(1) of the Constitution.

In *Democratic Alliance v Masondo*³⁹ two different interpretations of the absence of a constitutional separation of powers at local government level were offered. O’Regan J, in her dissenting judgment, explained the difference between local government and the other spheres of government (as regards the separation of powers) in the light of the nature of the functions of local government:

“They are not the high affairs of state – defence, foreign affairs, justice and security, but matters concerning delivery of services and facilities to local communities: power, water, waste management, parks and recreation and decisions concerning the development and planning of the municipal area. Thus executive decisions of municipal councils will ordinarily be decisions which have direct effect on the lives and opportunities of those living in the area.”⁴⁰

³⁵ Ss 85(2)(d) and 125(2)(f) of the Constitution.

³⁶ Ss 43, 44(1) and 104(1) of the Constitution.

³⁷ S 87 of the Constitution

³⁸ *Democratic Alliance v Masondo* (supra) at para 21.

³⁹ *Supra*.

⁴⁰ At para 60.

In O'Regan's further remarks on the exclusive nature of the executive mayoral committee, this view on local government is elaborated on:

“Those tasks involve primarily municipal planning as well as the provision of services such as power, water, waste removal, municipal clinics and fire-fighting services and the provision of amenities such as sports grounds, parks, libraries, markets and municipal transport. Without doubt, these are important services and facilities relied upon by all members of the community. They are not areas of executive authority which require the confidentiality and political cohesion of an exclusive executive team modelled on the cabinet for national government.”⁴¹

Sachs J, in his concurring judgment, took a more pragmatic approach and observed that “[b]ecause the Constitution is silent on the question of the kind of executive leadership that councils may have, I regard it as one of the areas not dealt with in the Constitution and accordingly left for legislative determination.”⁴² It is submitted that Sachs' interpretation is to be preferred, particularly in light of the variety of local governments that exist in terms of the Constitution. Firstly, all but one of O'Regan's examples of “high affairs” are exclusive national government functions, which mitigates the juxtaposition of local government vis-à-vis provincial governments. Furthermore, the emergence of metropolitan municipalities with more autonomy, the responsibility to oversee the lion's share of national economic activity and bigger budgets than some provinces has added a different dimension to the community services view espoused by O'Regan.

The statutory framework for mayors and speakers shows that a degree of separation of legislative and executive roles has been put forward in the statutory arrangements of the Municipal Structures Act, the Municipal Systems Act and the Municipal Finance Management Act. However, this is mostly a ‘soft’ separation as it concerns the separation of functions and not the separation of powers. It is left to the municipal council to decide how it equips its executive with powers to perform those functions.

The mayor remains a member of the municipal council after his or her election as mayor and is entitled to participate fully in proceedings of the municipal council. The municipal council actively performs both legislative and executive functions. In many municipalities, the vast majority of the functions of the council is executive in nature rather than legislative or law making. This, however, depends on the profile of the municipality. The councils of metropolitan municipalities, for example, tend to operate as assemblies. They are mostly vested with policy making and oversight powers; a degree of separation of power thus prevails and is implemented through the municipality's delegations. Councils of small municipalities, however, are more involved in executive decision making. They largely oversee themselves.

The application of the checks and balances rationale in the local government sphere is thus influenced by the manner in which the legal framework for the terms of reference and delegations has been applied by the municipality. It is important to note that the use of delegation to delineate powers is in itself a significant check on the powers of the

⁴¹ At para 77.

⁴² At para 48.

executive. The municipal council may withdraw a delegation, or review a decision taken in terms of a delegation, at any point to curb the powers of the executive.⁴³ In that way, there is a check built into the system that does not rely on a separation of powers.

Another feature of the local government sphere that inserts a form of checks and balances arises from the oversight powers that both the national and provincial governments have over local government. Although the Constitution clearly states that local government is an autonomous sphere of government, it permits both the national and provincial sphere to legislate with respect to local governance and to intervene in the affairs of local government within specified constraints. For instance, the province's MEC for local government, in the enforcement of the Code of Conduct for Councillors, ultimately decides whether or not a councillor must be suspended or dismissed for violations of the Code of Conduct.⁴⁴ There is no parallel system of comprehensive oversight at the provincial sphere.

In sum, these are the features of local governance that define the absence of separation of powers at municipal level:

- (a) All members of the municipal executive, including the mayor remain members of the municipal council.
- (b) The municipal executive may possess executive functions in terms of statutory law but it possesses no executive powers except those delegated to it by the municipal council.
- (c) As the municipal executive's powers are delegated, the municipal council has extensive oversight powers, including the power to reverse any decision taken by the municipal executive.
- (d) In some instances (i.e. municipalities of the plenary type), there is not even a separate municipal executive.
- (e) Municipalities are subject to an extensive legal framework and practice of oversight by national and provincial government.

Some of the consequences of the absence of separation of powers for the position of the speaker vis-à-vis the mayor are the following:

- (a) The speaker presides over whatever executive decision making takes place in the municipal council.
- (b) The speaker presides over the exercise of oversight over executive decision making, which is a potentially detailed and far-reaching type of oversight and thus different from parliamentary oversight.
- (c) The members of the executive, and thus the mayor, are subject to whatever authority the speaker has in terms of the Code of Conduct for Councillors.

⁴³ S 59(2) and (3) Systems Act.

⁴⁴ Item 14(6) Schedule 1 Systems Act.

The configuration, summarised above, harbours the possibility of conflict which indeed arises regularly in municipalities. The next section of the paper discusses the most common manifestation of such conflict by presenting an analysis of municipal practice surrounding delegations of power.

5 MANIFESTATIONS OF CONFLICT

5.1 Introduction

In many respects, the absence of a separation of powers at local level has set the scene for the development of unclear roles and responsibilities, resulting in (the potential for) conflict. A municipality's delegation system i.e. the manner in which it has sought to define roles and responsibilities of office-bearers and empower them with relevant powers is either the solution to those conflicts or an aggravating factor in them. An analysis of these systems should thus provide useful insights into municipal practice.

The delegation systems of the following municipalities have been reviewed for this section: Cape Town, Johannesburg, Metsimaholo Local Municipality, Cape Winelands District Municipality and the Greater Tubatse Municipality. They represent municipalities from all three categories of local government and include both large and small councils.

5.2 Agenda setting

The legislation is silent on who sets the agenda for council meetings. Agenda setting is usually dealt with in a municipal council's rules and orders.⁴⁵ However, it may be a bone of contention between the mayor and the speaker where, as is the case in some systems of delegations, there is silence in the delegations about agenda setting and it is not contained in the Rules and Orders.

It would appear that setting the agenda, deciding the order in which reports are discussed and allocating speaking time to councillors flows naturally from the speaker's role as chair of the meetings. However, municipal practice shows a picture that brings in the mayor and the (chief) whip as important stakeholders in this process. The Rules of Order of the City of Cape Town, for example, provides for a consultative procedure between the mayor, the chief whip and the speaker.⁴⁶ Ultimately the speaker has the final word on the agenda of the council meeting.

The Greater Tubatse Delegation Policy provides that "The Chief Whip advises the Speaker and Mayor on the agenda of council meetings."⁴⁷ It is silent on the role of the Speaker and Mayor in agenda setting. It could be argued that the reference above "advises the speaker and mayor" implies that the speaker and mayor are jointly responsible for the agenda setting.

⁴⁵ As is the case in the Hibiscus Coast, City of Cape Town and Greater Tubatse Rules of Order.

⁴⁶ Rule 16, City of Cape Town Rules of Order for Council and its Committees 15 March 2006, C 05/03/06.

⁴⁷ Greater Tubatse Delegation Policy Item 8.4.1

The Tlokwe Municipal Council's Rules of Order provides that "the Speaker is responsible for the preparation of the Council agenda ... in consultation with the Executive Mayor and Municipal Manager."⁴⁸ Here, it seems that the Speaker has ultimate authority for deciding the council agenda.

The practice of agenda setting in municipal councils is that the overwhelming majority of the content is derived from items generated through the municipality's administrative and executive system.

5.3 Code of Conduct

In addition to the conflicts that may arise from the speaker's authority to preside over meetings in which the mayor is a participant, there are additional sources of conflict within the roles statutorily assigned to the speaker under section 37 of the Structures Act. Section 37(e) states that the speaker must ensure compliance in the council and council committees with the Code of Conduct for councillors. The Code of Conduct for Councillors is intended to promote integrity amongst councillors and to promote public accountability and transparency in local government. The Code of Conduct deals with issues ranging from attendance at council and committee meetings⁴⁹ to councillor's intervention in the administration of the municipality.⁵⁰

In order to ensure compliance with the Code in committee meetings, including meetings of the executive committee, the speaker must have some means of communicating with the chairpersons of the committees to obtain information about the conduct of councillors in such committees. In addition, the speaker has the authority to authorise an investigation into the "facts and circumstances" of alleged breaches of the Code. Such an investigation may be commenced where the speaker reasonably suspects a breach. As a member of the Council, the mayor⁵¹ is not exempted from being a potential subject of such an investigation.

The enforcement of codes of conduct is within the traditional role of speakers in all spheres of government. Unlike the President at national and the Premier at provincial government level, however, the mayor is subject to the Code of Conduct and as such can be investigated by the speaker. Given the potential for competition between the offices of the mayor and the speaker, as the two seats of power in a municipality, the power of a speaker to investigate the conduct of the mayor has the potential to exacerbate an already tenuous situation, where it exists.

In both the Greater Tubatse⁵² and the City of Cape Town delegations, the mayor is afforded the role of enforcing the Code of Conduct in the event of the speaker allegedly being in breach of the Code of Conduct. It is suggested that this is a manifestation of a

⁴⁸ Tlokwe City Council Rules of Order, Item 6.2

⁴⁹ Items 3-4 Code of Conduct .

⁵⁰ Item 11 Code of Conduct .

⁵¹ S 54 Systems Act.

⁵² Item 3.14.3

wish to preserve internal checks and balances as opposed to relying on the intergovernmental checks and balances (i.e. the provincial government stepping in) to investigate the speaker's alleged violations of the Code of Conduct.

5.4 Councillor support: conferences and training

Johannesburg, Metsimaholo Local Municipality, Greater Tubatse, Cape Town and Cape Winelands District Municipality delegate to the respective mayors the power to permit councillors to attend workshops or conferences. In some cases, distinctions are made between conferences within South Africa and those overseas.⁵³ Usually, there is no distinction between conference attendances that are in the nature of training and those that are ceremonial or representative in nature.⁵⁴

The question is whether this practice is in line with the expected duties of the speaker. The speaker presides over council meetings, is responsible for ensuring compliance with the Code of Conduct and generally with ensuring the quality of debate in council. It may be argued that the speaker has a more direct interest in overseeing capacity building and training initiatives for councillors.

5.5 Public participation

All municipalities reviewed for this paper envisage a role for the speaker in enabling community participation in the affairs of local government. In some cases, the speaker is granted some independence in establishing the framework for community participation. In other cases, such as in Metsimaholo Local Municipality, the mayor is granted more authority with respect to the establishment of ward committee structures and the speaker plays a supporting role. The mayor is “responsible for liaison with the community, ward committees, other committees and councillors, and political office bearers in the different spheres of government.” Section 10 (b) of the delegations provides that the speaker “assists the EM with liaison with the community, ward committees and councillors.”

In Greater Tubatse, the speaker has robust authority with respect to the establishment and functioning of ward committees. The speaker “facilitates, oversees and supervises the election of ward committees in accordance with council’s policy on the election of ward committee members (other than ward councillors)”. In addition, the speaker “deploys proportional representative councillors to ward committees”, “monitors and reports on the performance of ward committees to the council;” and “makes recommendation to the Municipal Council on the dissolution of a ward committee.”⁵⁵

⁵³ For instance, in Cape Winelands System of Delegations, the Executive Mayor authorises councillors participation in conferences or workshops within RSA but only the Mayor and members of the Mayoral Committee attend conferences or workshops outside South Africa.

⁵⁴ The Cape Winelands System of delegations makes the distinction. The speaker has the power to approve councillor training while the Mayor, in consultation with the Deputy Executive Mayor, grants approval for workshops, congresses and meetings within South Africa.

⁵⁵ Item 2.8.

The SALGA Handbook for Councillors also envisions a similar role for the speaker in arranging for the election of ward committees and, where necessary, conducting the election for ward committees.⁵⁶

The Cape Town system of delegations translates the local accountability provisions of the preamble to the Code of Conduct of councillors into specific functions for the speaker. Paragraph 16 authorises the speaker to determine the administrative arrangements to enable ward participatory mechanisms to perform their functions and requires the speaker to oversee the establishment and coordination of the ward participatory mechanism.

However, where the delegations do not provide clarity on the roles of the speaker and mayor, respectively, conflicts are likely to be exacerbated. Engaging communities on public policy is a fundamentally political activity. Conflicts will arise particularly where the *substance* of public participation, i.e. the actual engagement with communities on policy is confused with the *administrative functioning* thereof, i.e. the functioning of ward committees and organisation of public meetings.

5.6 Chief Whip

The role of the chief whip or council whip adds an additional level of complexity to an analysis of the tensions that exist between political office bearers in local governance.

The extent of the problem varies from municipality to municipality. When the municipality has a full-time whip the role confusion becomes more apparent. Municipalities above a certain size may have a full-time whip “appointed for council”.

Powers of the chief whip in terms of delegations policies are quite often similar to that which one would generally expect to see assigned to the speaker. For instance, under the Johannesburg delegations, the chief whip is responsible for “the maintenance of discipline among all councillors.” In Cape Town, the Chief Whip is required to prepare, in consultation with the speaker, the annual calendar of meetings of council and committees. The chief whip is also authorised to grant leave to councillors, while this power is reserved for the Speaker in Greater Tubaatse.

A look at an earlier provincial government policy framework document reveals the thinking behind the role of the chief whip vis-à-vis the speaker and mayor. “The approach [to dealing with the speaker/ mayor conflict] should not be informed by wanting to determine who has more powers than the other, but how best they, under the guidance of the chief whip, can utilise the relevant legislation to turn the municipality into an effective tool for transformation and accelerated service delivery.” It goes on to say that “the chief whip should play a central role in coordinating and managing the council work.” It also envisages significant oversight role for the chief whip over the speaker and mayor: “Any political activity that the speaker engages upon should be carried out under the supervision of the chief whip.” Similarly, “the mayor’s political programme should be monitored by the chief whip.” It is thus evident that the chief whip

⁵⁶ SALGA handbook pg. 145.

is a political functionary placed to ensure that party political interests are carried out by the office bearers.⁵⁷

The Greater Tubatse Delegations Policy provides that the Chief Whip is “responsible for the political management of council meetings and committee meetings. He or she promotes and maintains harmonious party to party relations and ensures that political decision making takes place timeously and diligently.” It goes on to say that “even though the Chief Whip is not a statutory functionary of the municipality, his or her role is recognised as essential for the efficient operations of council and its committees.” Significantly, it adds that “the Chief Whip reports to the Speaker regarding his or her institutional roles and functions.”⁵⁸ At first glance, the Tubatse delegations consider the Chief Whip as an advisor and assistant to the speaker. For example, it provides that the role of the Chief Whip in as far as attendance at council and committee meetings is to “inform councillors of council and executive committee meetings called by the Speaker or the Mayor respectively...and ensure that the meeting of council and committees of the Council quorates.”⁵⁹ Moreover, the Chief Whip “advises the Speaker and Mayor on the agenda of council meetings; and informs councillors of Council and Executive Committee of important items on the relevant agendas.”⁶⁰ The Chief Whip must further advise the Speaker on “the amount of time to be allocated to speakers and the order of such speakers in addressing the council...and ensures that the councillor’s motions are prepared and timeously tabled in the Council in terms of the Rules of Order.” The Chief Whip is also tasked with assisting the Speaker with the counting of votes and advising the Speaker and Mayor of urgent motions or how to deal with important items not disposed of at a council meeting.”⁶¹ The Chief Whip may also attend forums or meetings of other chief whips in municipalities or in the provincial and national sphere and must provide “feedback to the Speaker after such meetings.”⁶²

It would appear that again, the quality of the Terms of Reference and delegations are crucial in ensuring that conflicts between the two offices are prevented as far as possible. In addition, the newly acquired full-time status of some council whips appears to be an important factor.

5.7 Legal representation for councillors

To the extent that systems of delegations are silent on this issue, the power to authorise legal representation is retained by Council. However, most delegation policies deal with the issue.

⁵⁷ *Framework for allocating functions and responsibilities to speakers and mayors and managing their activities to ensure that they contribute to the overall functioning and effectiveness of municipal councils*, The North West Perspective (Office of MEC, North West), 30 July 2001.

⁵⁸ Greater Tubatse Delegations Policy, Item 8.1

⁵⁹ Item 8.3.

⁶⁰ Item 8.4.

⁶¹ Item 8.5.

⁶² Greater Tubatse Delegations Policy, Item 8.7.3.

Cape Winelands authorises the Speaker to “consider granting legal representation to councillors against whom legal proceedings have been instituted or are being contemplated, as a result of any act or omission in the exercise of their duties.” In contrast, the Greater Tubatse Delegation Policy authorises the mayor to provide legal representation to a councillor where “legal proceedings have been instituted against the councillor... or the councillor has been summoned to attend any inquest or inquiry arising from the exercise of his or her powers or the performance of his or her duties”.⁶³ Similarly, in Tlokwe and the City of Cape Town, the mayor is authorised to provide legal representation to councillors.

It may be argued that the decision to authorise legal representation for councillors is a power that should ordinarily reside with the office that is responsible for maintaining the integrity of the representative assembly. Practice shows, however, that not all municipalities share this approach.

6 REASONS FOR CONFLICT

6.1 Unclear, incomplete or absence of terms of references

As was mentioned earlier, the legal framework provides a number of instruments that municipalities must use to structure their internal functioning. Moreover, the legal framework anticipates contestation and tension and therefore insists on a terms of reference with dispute resolution mechanisms for each political office-bearer. None of the municipalities under review appeared to have adopted specific terms of reference as envisaged in section 53 of the Municipal Systems Act that provide for such dispute resolution mechanisms. Therefore, when conflicts arise, there is no recourse to the terms of reference for guidance or dispute resolution mechanisms.

Two observations can be made in this regard. Firstly, the need to carefully define the terms of reference of the speaker is more obvious than the need to do the same with regard to the mayor. The reality is that the mayor is the political head of the municipality who has greater political profile and clout than the speaker. Secondly, it is apparent that the problem becomes more pronounced as the size of the council decreases (until the size of the council is so small that speaker and mayor are one). This is no coincidence; large municipalities appear to have organised themselves more or less according to a separation of powers idea, which goes a long way at creating clearer positions for the speaker and the mayor.

The role of the speaker in district and local municipalities has often been ill-defined. At times, the overlap in roles with the mayor has caused political tension and misunderstanding. Municipal councils may have attempted to fill up the speaker’s time or to use municipal council’s power of delegation to attempt to amplify the speaker’s role in the distribution of functions. That is, rather than having the delegations linked to the functions that have been statutorily assigned to the speaker or that would be considered as ‘legislative’ functions, there is the temptation for municipal councils to use delegations as a means to “create work” for the speaker.

⁶³ Greater Tubatse Delegation Policy Item 3.12.

6.2 Full-time status of speakers

The designation of political office-bearers as full-time is a significant consideration in the analysis of potential conflict between political office bearers. Before the dynamics of full-time speakers are discussed, the legal framework for the designation of full-time speakers is outlined.

The Municipal Structures Act has established a layered system of decision-making about the question of which councillors are designated full-time.⁶⁴ The national Minister of local government determines a policy framework after consulting the MECs for local government. Subsequently, the MEC makes an individual determination in the section 12 notice within that policy framework. The policy framework of the Minister designates the range of office-bearers that may be full-time. Currently, this policy framework designates the speaker in each category of municipality as possibly full-time.⁶⁵ The MEC then has the discretion to determine which of those he or she may want to designate as full-time. However, the MEC cannot add to the range of office-bearers, although he or she may choose some or all to be full-time. Within the parameters of the MEC's determination, the council decides which councillors are full-time. The same principle as above applies: the council cannot add to the range of office-bearers but could choose some or all to be full-time.

This designation of all speakers as full-time needs to be reviewed to determine to what extent it creates the temptation to inflate the job description of the speaker to justify his or her full-time status, particularly in small municipalities. If it does not, consideration may have to be given to placing limitations on the number of speakers that are full-time by, for example, linking the full-time status to a minimum size council. The legal framework provides opportunities to all three spheres of government to effect such limitations. At a national level, the Minister could limit the number of speakers that can be designated as full-time by including certain standards in the national policy framework. At a provincial level, the MEC for local government could do the same. Finally, the municipality itself has the final word and could decide that it does not need a full-time speaker.

6.3 Emergence of the chief whip

The emergence of the political office of a chief whip or whip has added another dimension to the definition of the role of the speaker. It may be argued that there are now three seats of political power in each municipality. Where the role of the chief whip relative to the mayor and particularly the speaker is not clearly defined, it can result in conflict. It was mentioned earlier that municipal practice seems to suggest that the powers being granted to the chief whip may be similar to those which one would generally expect to see assigned to the speaker.

There is no doubt that the whip is a political reality and that the political functioning of a municipal council may depend greatly on the good offices of a whip. However, where a

⁶⁴ S 18(4) Structures Act. See also Steytler & De Visser *Local Government Law of South Africa* 2007 LexisNexis: Durban 3-5.

⁶⁵ Local Government: Municipal Structures Act (117/1998): Policy framework for the designation of fulltime councillors GN 2073, Government Gazette 23964, 18 October 2002

whip is allocated 'institutional' powers that clearly intersect or overlap with the activities of the speaker, such as for example the granting of leave of absence for council meetings or the enforcement of council discipline, a problem is in the making. This is because the speaker, and not the whip, has, by statute, been allocated the 'institutional' powers to enforce these matters (namely in terms of the Code of Conduct). The whip has no institutional powers to enforce the issues that the delegations policy may have assigned to him or her. The powers that the whip may employ to enforce councillor discipline exist in terms of party rules, not in terms of the Municipal Systems Act. The muddling of internal party discipline and the enforcement of the Code of Conduct is likely to lead to contestation. Furthermore, it may very well be that an expansion of the whip's role in the area of councillor discipline at the expense of the speaker will have a knock-on effect in the form of exploration by the speaker onto the terrain of the mayor.

7 RECOMMENDATIONS AND CONCLUSION

This paper has explored certain sources of conflicts between political office bearers in local government. The analysis has focused specifically on the conflicts between the role of the speaker and the mayor in a municipality. It has been determined that overlaps and unclear mandates exacerbate the potential for conflict. This section canvasses three broad options for addressing these conflicts. To varying degrees, the three options require some form of statutory amendments that give effect to them.

7.1 Consolidate office of speaker and office of mayor

The assumption of the legal framework is that, despite the consolidation of legislative and executive powers in one council, the speaker and the mayor can co-exist in one council provided that their respective roles are clearly defined. However, there is the real possibility that such conflicts will perpetuate themselves as long as there are two seats of power in one council that exercises both legislative and executive power.

Is the answer then to dissolve the office of the speaker and designate the mayor as chairperson of the council? Should the concept of the so-called 'plenary-type' municipality, where the two offices are combined, be extended to all municipalities?

As previously discussed the checks and balances argument for the separation of powers is of little import in local governance (with the exception of large councils) given the significant powers of legislative oversight provided to both the national and provincial governments and the absence of a separation of powers at the local level. Although the division of labour argument has been determined to have some application in municipal governance, it may well be that, all things considered; the mayor could perform all the statutory functions currently assigned to the speaker with respect to the operations of municipal council. To the extent that the mayor becomes overburdened by those functions, the municipal council could delegate some of the functions currently delegated to speakers to other functionaries such as the deputy mayor and a committee of council who have a narrow and more specified scope of authority. In practice that would mean that the mayor would acquire responsibility for the functions mentioned in section 37 of the Structures Act such as ensuring that council and the committees meet, chairing council meetings, (with assistance from the municipal secretariat or other relevant bureaucratic structures) and ensuring compliance with the Code of Conduct. The Council

will then use its delegation powers to distribute any additional powers and functions to other designates, such as individual councillors or the chief whip. Because they will obtain their authority solely by delegations, there will be no real competition with the mayor.

The resulting structure would be that the mayor also becomes the statutorily designated bearer of the authority to chair council meetings and enforce councillor discipline. The mayor will enjoy the authority to delegate some of his or her functions to another municipal councillor. The potential for conflict would then be mitigated by the fact that the councillor's authority is granted at the discretion of the mayor. There is therefore no real conflict. Power is effectively shared between the mayor and the municipal council, both of which may delegate powers and functions as necessary.

Because of the significant role that the council plays in municipal governance, this option does not result in full centralisation. That is, the council continues to play a significant role. What it contemplates is a consolidation of the political offices. While this option will possibly eliminate the conflict, it requires an amendment to the Municipal Structures Act and all other statutes referring to the office of the speaker. A constitutional amendment would not be necessary since the Constitution makes no reference to a speaker in local government.

7.2 Separation of powers at municipal level

The converse option would be to accentuate the role of the speaker instead of collapsing it into the mayor's role. This could be done by effecting a separation of powers in local government similar to that which exists at the national and provincial sphere. The argument is then that a separation of the council's activities into, on the one hand, legislative and oversight functions and, on the other hand, executive functions would set the stage for a clearer functional division between the speaker and the mayor, akin to the national and provincial situation.

This option would require an amendment to s 151(2) of the Constitution and a radical re-working of the legislation dealing with the political structures in local government. The speaker would retain many of the same functions the speaker currently holds. However, the statutory roles and position of the mayor and, if applicable, the executive committee, would be amended significantly. It is suggested that this option would dictate that the mayor would cease to be a member of the municipal council once elected. Other members of the executive committee would remain councillors. The same would apply to members of the mayoral committee. The mayor would be removed from the ambit of the speaker's oversight on matters of councillor conduct and investigation of councillors for suspected breaches thereby removing a possible source of conflict. The speaker will oversee council's proceedings as they deal with legislation and oversight over the executive (i.e. the executive mayor or the executive committee). The speaker will be responsible for enforcing the Code of Conduct with respect to councillors. However, the speaker will have no authority to enforce the Code of Conduct with respect to the conduct of the mayor. Most importantly, the speaker would no longer preside over executive decision making. The mayor will perform the ceremonial functions and will be responsible for overseeing the bureaucratic arm of government in implementing the by-laws and other directives promulgated by the municipal council. Typically a mayor in this

kind of arrangement is directly elected by the public rather than by council.⁶⁶ However, this structure does not align with the parliamentary system and tradition that prevails at all three levels of government. Secondly, a directly elected mayor is not necessary. If the role envisioned for the mayor were to implement council directives, it would seem intuitive that councillors elect from amongst themselves an individual who they believe will be able to give effect to council's mandate.

This option represents a fundamental shift in power relations within the municipality and would have significant repercussions throughout the local government system:

- For example, as a function of the council exercising both legislative and executive powers, there is no neat division between legislative and executive instruments at municipal level. Simply put, making a watertight division has never been necessary. To argue, in the implementation of the above scheme, that the adoption of by-laws in terms of s 160(4) of the Constitution is the only 'legislative' function of a municipal council would ignore the fact that municipal councils adopt resolutions that are, for all intents and purposes, legislative in nature.⁶⁷ It is suggested that the reduction of the municipal council's legislative function to the adoption of by-laws would not be in keeping with a realistic approach to its role. This would mean that, wherever legislation requires municipalities to adopt resolutions that are policy making or legislative in nature, an assessment needs to be made whether or not these should be converted into by-laws or whether the adoption of these resolutions can be left to municipal executives.
- The consequences for the collective executive system, prevalent in the majority of municipalities, are significant. This system is designed to impose 'fair' or 'proportional' representation of the council on the executive, which exercises this executive authority as a collective. Should the mayor occupy a separate position in that he or she is the only member that is not a councillor and perceived to somehow have a separate mandate, this may frustrate the collective nature of the executive committee.
- The current configuration surrounding the appointment of the municipal manager by the municipal council would become difficult to sustain. A natural working relation makes it incumbent on the executive to appoint the head of the administration. Should the executive function be removed from the council, it would no longer be appropriate for the council to appoint the municipal manager. It would then follow that the executive, i.e. the executive committee or executive mayor would appoint the municipal manager.

Aside from the above considerations, it is suggested that the absence of a constitutionally determined separation of powers at municipal level should be viewed in light of a municipality's specific developmental mandate. The Constitution charges a municipality

⁶⁶ In Uganda, for example, the mayor is elected by the public while the speaker is elected by members of council.

⁶⁷ Examples are tariff policies (s 74 Municipal Systems Act), property rates policies (s 3 Local Government: Municipal Property Rates Act 6 of 2004) and debt collection policies (s 97 Municipal Systems Act).

with the duty to provide ‘democratic development’ in its area of jurisdiction.⁶⁸ The objects of local government, provided in section 152 of the Constitution are useful in the interpretation of this mandate. The Constitution instructs a municipality, in subsections 152(1)(b),(c) and (d) to ‘deliver the outcomes’ of service delivery, social and economic development and a safe and healthy environment but it is not silent on the manner in which a municipality should go about this. Subsections 152(1)(a) and (e) make it clear that a municipality should do so in a manner that not only enhances and nurtures democracy, but also promotes participation and inclusiveness. Consistent with this is the notion that the municipal council, where the variety of parties, interests and views prevalent in the municipality converge, is the organ that “makes decisions concerning the exercise of all powers”.⁶⁹ It is suggested that it was the Constitution’s intention not to limit the imperative of open debate in a transparent setting, which are key features of the council meeting, to legislative decisions only. Instead, the Constitution sought to extend this imperative to all council decisions. The fact that a council may delegate powers to organs within the municipality does not detract from this. The ultimate responsibility for decisions taken in terms of delegated authority remains with the council. In the same vein, the council has the ability to revisit any decision taken in terms of delegated authority⁷⁰ or revisit the delegation of authority.⁷¹

Given the above rationale and the earlier practical considerations, it is apparent that it would be unwise to rush into reforms that introduce separation of powers at municipal level. Moreover, grounding such reforms in a desire to pacify office-bearers, rather than a fundamental disagreement with the above rationale, would amount to the tail wagging the dog.

This does not mean that disagreement with the above rationale is not possible. However, such arguments require a nuanced analysis of municipal practice. For example, the type of inclusive executive and administrative decision making that lies at the root of the rationale for the absence of separation of powers may not be realistic for municipal councils of large municipalities. Can the 200 councillors of the City of Cape Town, which congregate in council meetings approximately eight times per year realistically be expected to fulfil that vision?

A debate on the appropriateness of the absence of separation of powers at municipal level is thus necessary. However, the topic of this paper should not be the driver of that debate.

7.3 Clarify roles and responsibilities

⁶⁸ As Cameron puts it, “[t]he role of local government has to shift from traditional local service delivery and administration to local socio-economic development”, see Robert Cameron “The upliftment of South African local government” 27 (2001) *Local Government Studies* 104.

⁶⁹ S 160(1)(a) Constitution.

⁷⁰ The principle of inclusivity has found further expression in s 59(3)(a) of the Systems Act which provides that a quarter of the municipal council can demand a review of a decision taken in terms of delegated authority.

⁷¹ See also Steytler & De Visser “Local Government” *Constitutional Law of South Africa* 8-17 ff..

The final and least radical of the options is for there to be incremental changes to the local government political structure to eliminate known sources of conflict. This could all be done within the parameters of the current constitutional context where there is no separation of powers and both the offices of the mayor and the speaker exist alongside on another. There are two ways in which this could be done, namely, by law or delegation and terms of reference.

7.3.1 Statutory change

The statutory framework could be revisited to eliminate conflict-generating aspects. For instance, the ability of the speaker to commence an investigation into the facts and circumstances of an alleged code of conduct violation by the mayor can create conflict in an already tenuous situation. A change to the legal structure designed to minimise conflict could be to ensure that any investigation into alleged misconduct by the mayor should be commenced by the municipal council, not by the speaker. This would require an amendment to Schedule 1 of the Municipal Systems Act. Another aspect that could be revisited is the policy framework surrounding the full-time position of speakers. Consideration may be given to a tighter framework that renders full-time speakers in smaller local councils impossible.

7.3.2 Terms of reference/delegation

Despite some of the gains that may be made through amending the legal framework, municipalities themselves can still make a lot of progress within the current legal framework. The review of municipal practice suggests that most municipalities have not drafted terms of reference for speakers and mayors that include appropriate conflict resolution schemes and lines of accountability. Similarly, municipalities may be well advised to review their delegation policies to ensure that no conflict situations are invited through inappropriate or overlapping delegations.

Below are a few suggestions for delineation in certain contested areas.

7.3.3 Councillor support

Considering the role of the speaker and his or her ‘proximity’ to the functioning of councillors, it would be appropriate for councillor support functions to be assigned to the speaker. This would include the identification of relevant resources needed by councillors to support their work, including aspects such as office space, financial resources, educational material such as handbooks, guides, legislation etc.

7.3.4 Training

In line with the argument above, the speaker may be better placed to identify councillors to attend conferences and workshops in support of their functioning as councillors. The speaker may also be better placed to identify the training needs of councillors and to ensure that those needs are met by providing opportunities for in-house training and by authorising attendance at conferences and workshops.

A distinction should be made, however, between conference attendances that are in the nature of training and those of a political nature where the municipality needs to be

represented. Designating municipal representation in the latter case is better placed with the mayor.

7.3.5 Legal representation for councillors

The power to determine and grant legal representation for councillors may be a power that is appropriately located in the speaker's office. It appears to be consistent with the role of a speaker in parliamentary systems and is treated as such in both the national and provincial sphere. To the extent that this power involves some review of the conduct of a councillor and an assessment as to whether the municipality should assist the councillor with the legal costs, the speaker may be better placed than the mayor to perform this function. The decision on providing legal representation to councillors will also involve financial considerations. However, that, in itself, is not reason enough to require the mayor to perform the function provided that the function is exercised in terms of a council policy.

7.3.6 Public participation

The fact that there is no real champion of public participation within a municipality has perhaps exacerbated the lack of responsiveness and accountability municipalities are often blamed for. The growing discontent with the functioning of ward committees and with the unresponsiveness of councillors, are issues for which the speaker as the guardian of the Code of Conduct, should feel particular responsibility. A pronounced role for the speaker may also assist in dealing more appropriately with the participation by disadvantaged and marginalised groups.

The trend towards granting the speaker a significant role in enabling community participation mechanisms and in supporting the establishment and functioning of ward committee structures has been important in the evolution of the role of the speaker. It flows from the speaker's statutory position as the champion of the Code of Conduct. Performing this function is also complimentary to the speaker's role in supporting councillors in the performance of their functions.

However, the 'allocation' of community participation to the speaker without any nuance is dangerous. The municipality's (executive) mayor remains the most politically visible office-bearer with the responsibility to represent the municipality politically, also to communities. The suggestion is that municipalities should seek to make a distinction between the process of community participation on the one hand, and the substance of interaction with communities within that process. The speaker ensures a sound process whilst the mayor (or whomever he or she designates) is responsible for handling the content. The speaker should never be responsible for prioritising community needs or defending the municipality's policy positions (except when they concern issues of the Code of Conduct or council procedure).

Furthermore, any policy making on community participation must be done by council. The speaker can prepare and initiate such a policy, but the adoption of a policy is the sole responsibility of council. The speaker is also bound to work within the limitations of the Code of Conduct; the speaker has only those powers and functions granted in the Code of Conduct or through delegation from the council.

There are a number of functions which the speaker could perform in facilitating public participation in council processes. First, the speaker should ensure that the principles of transparency in the legislation are adhered to. These include public notice of meetings, comment on draft by-laws and policies. The speaker could be specifically designated to advise council on the treatment of confidential information and on whether council or committee meetings should be closed to the public.

Second, the speaker should oversee the election of ward committees within the policy set by council to ensure that the ward committees are representative and not politicised. The speaker can also be tasked to oversee the functioning of ward committees and advise the municipal council when a ward committee ought to be dissolved in terms of section 78 of the Municipal Structures Act. Third, the speaker can ensure the effectiveness of ward committees, within council policy, through supporting the functioning of ward committees by, for example, budgeting for ward committee meetings and making sure that information about meetings is readily available to the public and that the information is in the appropriate languages and media.

Finally, the speaker can ensure the effectiveness of ward committees and the accountability of ward councillors through establishing a system of report backs from ward committees to council structures. For example, the speaker should design appropriate and efficient mechanisms to ensure that ward committee reports and recommendations are entered onto the council or committee agendas.

7.3.7 Speaker's role in legislation

As head of the 'legislative arm' of council, the speaker's role in legislation should be more clearly defined. The speaker should in fact be the head of the entire legislative process since (s)he would be in the best position to determine which matters are processed as by-laws and which are processed as resolutions, or not processed at all. For instance, once a proposal for a by-law is made, the speaker should check whether the area of competency being legislated on is in fact a municipal competency. Even if it is a municipal competency, the speaker would then investigate whether there are any provincial and national laws regulating the same area which have to be complied to. The role played by the speaker's office could be compared to the state law advisor's role at provincial and national level. In order for the speaker to be able to discharge this function appropriately, the speaker's office should be equipped with the necessary expertise.

7.3.8 Agenda setting

Municipalities can minimise the potential for conflicts over agenda setting by adopting systems of delegations or rules and orders that clearly state how the agenda will be set and which parties will be consulted. It is advisable for the speaker to be the driver and the ultimate decision maker of the agenda setting process for council meetings. However, consultation with the mayor, municipal manager and possibly the chief whip would often be appropriate.

7.3.9 Committee system

It may be fitting for the speaker to be allocated a specific role in the design and monitoring of the municipality's committee system. While the council makes the final decision on the establishment of section 79 committees that report to the council, the speaker may be best placed to prepare the council for that decision. The speaker's role with regard to section 80 committees is more complex. Section 80 committees are established by the municipal council. However, they are established to assist the municipal executive. It may thus be appropriate for the executive to advise the council on their establishment, rather than the speaker.

In terms of monitoring the committee system, the speaker could perform an important role. Importantly, a separation of political and administrative roles is necessary. Integration between the work of committees, ensuring that the chairperson calls meetings, that reports are tabled and that the committees are functioning effectively, should be the responsibility of the speaker. This is consistent with the speaker's duty to ensure that council functions efficiently. However, oversight over the political content of the committees' work is reserved for the body that it reports to, which may be the executive or the council.

7.3.10 Council whip

With regard to the role of the (chief) whip the same principle of clear definition applies. As the whip is not an office-bearer in terms of the Municipal Systems Act, the municipality is not obliged by law to adopt a terms of reference for the whip. However, it is advisable for municipalities to commit to a clear definition of the role of the whip as it is important to delineate the whip's role in relation to the speaker. The guiding principle should be that no institutional powers or functions should be assigned to the whip as they are likely to interfere with the speaker.

The delegations of Greater Tubatse Municipality provide a good model as it provides a clear terms of reference for the chief whip and also states that the "chief whip reports to the Speaker regarding his or her institutional roles and functions." By so doing, it creates a clear reporting line that will likely promote efficiency in the decision making process.

7.4 Conclusion

There is little doubt that local communities are best served when all office bearers have clearly defined roles and functions that work symbiotically, with clear reporting lines, such that both politicians and bureaucrats can focus on the business of development rather than political wrangling. There is also no question that competition between office bearers regarding their roles and functions can cripple a municipality.

Of the three options mooted, consolidating the office of the speaker and mayor and introducing a separation of powers at the municipal level requires legislative or, in the case of the latter, even constitutional amendment. To the extent that both options require a radical revision of the political structures in local government and an arduous amendment process, neither of these options may be politically tenable or even desirable. The third option of clarifying the roles and responsibilities of the mayor and speaker could be implemented within the current constitutional context and political structure with little, if any, statutory amendment required. In this regard, a clearer definition of

boundary lines between the office of the speaker and mayor (and chief whip) would go a long way towards ensuring efficiency and development.

As one policy framework document concluded “it is crucial to find ways of dealing with the current problems and confusion around, *inter alia*, the role of speakers and mayors, so that councils can begin the work of translating election promises into tangible deliverables.” Municipalities should take heed and create the optimal political structure and climate to enable and ensure better accountability and responsiveness to its inhabitants.

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Municipal policies

Cape Winelands System of Delegations

City of Cape Town Rules of Order

Greater Tubatse Delegation Policy

Greater Tubatse Rules of Order

Hibiscus Coast Rules of Order

Tlokwe City Council Rules of Order