

RE: LOCAL GOVERNMENT: MUNICIPAL STRUCTURES SECOND AMENDMENT BILL, [W68-2002]

SUBMISSION 1: The Act must specify that a change of the type of municipality is possible during the term of council.

I. Legal Framework

It is understood that the introduction of the Bill is necessitated due to the fact that the *Local Government: Municipal Structures Act, 1998 (Act 117 of 1998)* ('the Act') is unclear with regard to the principles and procedure applicable when a MEC for local government ('MEC') attempts to change the types of municipalities in a province during the term of a municipal council.

In the new local government dispensation, a municipality is established by means of publishing a notice in a Provincial Gazette. The contents of such an establishment notice are governed by the provision in section 12(3) of the Act and the type of municipality that is established must be specified. It follows then, that in such an establishment notice, one will find an item dealing with the type of municipality that was established.

Section 16(1) of the Act gives the MEC the power to amend an establishment notice "to change the municipality from its existing type to another type". The Act as well as chapter 2 of the *Local Government: Municipal Structures Amendment Act, 2000 (Act 33 of 2000)*¹ is silent with regard to **when** a MEC may amend the establishment notice of a municipality as to change the municipality's type. Thus, the question needs to be answer of whether an establishment notice of a municipality can be amended during the term of a council specifically to change the municipality's type. Such an amendment will have a profound effect on the internal structures and functionaries of a municipality.

Section 16 of the Act read with chapter 2 of the Municipal Structures Amendment Act, 2000 outlines the procedure to be followed when a MEC considers the amendment of an establishment notice.

¹ This chapter sets out additional transitional arrangements in respect of the new local government dispensation that needs to be followed for the duration of the transition period that the local sphere of government finds itself in.

Chapter 4 of the Act is host to the provisions dealing with the internal structures and functionaries of a municipality and it is clear that not all of these provisions will apply to a municipality, but the applicability thereof is determined by the type of municipality involved. After intensive scrutiny of the provisions in chapter 4 of the Act, one is not nearer to finding an indication of **when** a MEC may amend an establishment notice of a municipality as to ensure a change to the municipality's type. Thus, chapter 4 of the Act is silent on whether such a change may occur during the term of a council.

The silent rule of interpretation determines that if the legislature wanted to regulate a certain matter, it would have done so with specific provision within the applicable legislation. Therefore, the current legislative framework does not provide for the amendment of an establishment notice during a term of council with the specific aim to change the type of municipality.

In summary, the legislative framework gives the MEC the power to amend an establishment notice and provides for a specific process that needs to be followed when doing so, but is silent on whether such an amendment can be made during the term of a council.

II. Comment on Bill and Recommendation

The proposed amendments does not address the **when** issue, but the **how** issue. It follows that the **how** issue should be addressed by the MEC within the section 16-amendment notice and not in the fashion as proposed in the Bill. What the Bill needs to do is to provide for the disestablishment of political structures due to the change of the type of municipality during the term of council.

It is recommended that section 16(1) of the Act be amended to read as follows –

“The MEC for local government in a province, by notice in the *Provincial Gazette*, may, at any time during or at the end of a term of council, amend a section 12 notice - ...”

SUBMISSION 2: Changes to the type of municipality during the term of council must be possible for all existing types listed in the Act.

I. Legal Framework

Section 7 of the Act lists the different types of municipalities that may be established by the MEC and the following three types is of importance, namely a collective executive system, a mayoral executive system and the plenary executive system.

If amendments to the Act are considered to reflect a change of the type of municipality during the term of council, it logically follows that such an amendment should reflect possible changes of all types of municipalities already listed in the Act. For example, in December 2000 seven municipalities in the Western Cape Province were established as plenary executive municipalities (Plettenberg Bay, Laingsburg, Kannaland, Prince Albert, Swellendam, Cederberg and Cape Agulhas). There is no prohibition in the Act regarding the change of a plenary executive type of municipality to a mayoral executive type of municipality. In practice it can be argued that it is not the best executive governance structure choice for these smaller municipalities, for example in the case of Laingsburg a change from the plenary executive system to the mayoral executive system will result in the council electing an executive mayor and the later then appointing only two members to the mayoral committee.

II. Comment on Bill and Recommendation

The current amendments only deal with the change of the collective executive type of municipality to a mayoral executive type of municipality and *visa versa*. It does not provide for the change of a plenary executive type of municipality to a mayoral executive type of municipality, as would be the case in some instances in the Western Cape Province. Thus, the amendments should reflect a complete as well as reversible option when considering the change of the type of municipality.

SUBMISSION 3: The proposed amendments must be drafted in clear language as to express the nature and consequences of the change of a type of municipality during the term of council

I. **Consequence A**

When a section 16 amendment on the change of the type of a municipality comes into effect, it means that the type of executive governance structure of a municipality is changed. It means that the former type of governance structure is replaced with a new type of structure. When functionaries within the executive governance structure of a municipality are changed (meaning the

establishment and election of political office bearers and committees), it does not result in the changing of the type of governance structure for the municipality. A change to the type of governance structure cannot be interpreted to be a vacation of office as mend in section 27 of the Act or the dissolution of a municipal council as provided for in section 34 of the Act.

A change to the type of municipality during the term of council results inter alia in the termination of an executive committee and a mayoral committee. It is inappropriate to refer to this as a vacation from office seeing that the office in it self ceases to exist and is disestablished when the type of municipality is changed.

In principle the position of the speaker is not influenced by a change to the type of municipality during the term of council. However, in the case of a plenary executive type of municipality, the speaker and the mayor is one and the same councillor. Therefore, when a plenary executive type of municipality is changed to either a mayoral executive system or a collective executive system, the mayor and the speaker will no longer be one and the same councillor and this unique situation needs to be addressed by the legislator.

Comment on Bill and Recommendation

The drafting style of the proposed amendments does not ensure legal certainty and may lead to confusion in understanding the process involved and consequences of changing the type of a municipality during the term of council.

It is recommended that a single section is drafted to address Consequence A –

“The change to the type of municipality during the term of council –

- (a) disestablish the political structures of the council as referred to in sections 42, 48, 55, 60 of the Act as well as section 36 as is applicable to the plenary executive system; and
- (b) requires that the council elects new political structures as needed for the functioning of the new type of municipality as provided for in the Act.”

II. **Consequence B**

A change to the type of municipality during the term of the council results into the termination of the term of the elected political office bearers such as the mayor and deputy mayor. Section 48(4) of the Act states that “*A mayor and deputy mayor is elected for the duration of that person’s term as a member of the executive committee*” and the conditions set out under which these office bearers vacates their office does not provide for a change of the type of municipality during the term of council.

The intention of the Bill is that a new election of office bearers due to the change of the type of municipality during the term of council constitute a new term. This could be more clearly explained.

Comment on Bill and Recommendation

This consequence is currently not explicitly addressed in the proposed amendments and it is recommended that a single section is drafted to address Consequence B –

“The election of councillors as mayor or deputy mayor in terms of the new type of municipality is regarded as a new term of office for the purposes of section 48(5) and section 57(2) of the Act.”

III. **Consequence C**

Other practical consequences of changing the type of municipality during the term of council is that the newly established executive governance structure of a municipality would have to adopt a new system of delegations in terms of section 59 of the Municipal Systems Act as well as new terms of reference for the relationship between the municipality’s political structures, office bearers and the municipal manager (section 53 of the Municipal Systems Act).

Comment on Bill and Recommendation

The proposed amendments to the Act do not address this matter. It is recommended that these and other similar practical matters can successfully be addressed in the section 16-amendment notice.