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TOWARDS A COMMON FRAMEWORK FOR MANAGING LOCAL AUTHORITIES AND SERVICE RE-ORGANISATION PROCESSES IN ACCORDANCE WITH CHAPTER 8 OF THE MUNICIPAL SYSTEMS ACT, ACT 32 OF 2000: AWARENESS DOCUMENT DEALING WITH THE LEGISLATIVE FRAMEWORK OF CHAPTER 8 OF THE MUNICIPAL SYSTEMS ACT

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1. Introduction

- 1.1 This awareness document was prepared by the Local Government Project to address the implementation of Chapter 8 of the Municipal Systems Act.
- 1.2 The introduction of sections 76 - 82 of the Municipal Systems Act from 1 March 2001, have sparked off much uncertainty and a flurry of activity aimed at determining an appropriate and consistent approach in respect of service re-structuring and decisions relating to choice of service mechanism. This document attempts to summarize current views and opinions on the matters under discussion, provides municipalities with guidelines and further attempts to provide a framework for decision-making and implementation.
- 1.3 The content of this awareness document was reviewed against the backdrop of the Cape High Court judgment in SAMWU vs the City of Cape Town and others (unreported, case no. 7262/2001).
- 1.4 In finalizing this document the author recommended that the nature and scope of this document should rather be that of an awareness document and not a document in which guidelines for the implementation of Chapter 8 of the Municipal Systems Act is communicated. The reason being that there is such dynamics involved in this field of law that new perspective on the implementation is crafted monthly.

2. Background

- 2.1 The Constitution outlines the objects for local government in section 152, which all municipalities must strive to achieve within its administrative and financial capacity. Section 153 builds upon these objects of local government by outlining the developmental duties of municipalities. The Municipal Systems Act obliges municipalities in two key areas to consider its actions so as to give effect to these Constitutional obligations. Firstly, municipalities must ***organize its administration*** in such a manner so as to give effect to section 152 and 153 (see

section 51(c) of the Municipal Systems Act). Secondly, Chapter 8 of the Municipal Systems Act sets the framework for giving effect to the Constitution in the *delivery of municipal services*. Section 73 outlines the obligations of municipalities to service delivery by giving priority to the basic needs and promoting the development of the local community, as well as to ensure that all members of a local community have access to at least the minimum level of basic municipal services. In addition section 73(2) sets out principles for the delivery for municipal services.

2.2 It follows that municipalities have an obligation to actively seek to achieve the Constitutional objects and developmental duties of local government in how it organizes the delivery of its services and structures its administration.

2.3 However, not all services currently provided by local government are strictly speaking municipal services.¹ Municipalities can legally provide services in terms of the basic following categories:

- a) Municipalities can provide those municipal functions and powers are listed in terms of *Schedules 4B and 5B of the Constitution*. However, the performance of these functions and powers are circumscribed in the following manner:
 - i. Category A municipalities, such as the City of Cape Town, can provide the full range of municipal services listed in the Constitution;
 - ii. The Municipal Structures Act, as amended, divides the range of municipal services between Category B local municipalities and Category C district municipalities (see section 84(1) and (2));²
 - iii. Most local municipalities are also authorized to continue with the delivery of some district municipality services in terms of sections 84(3) of the Municipal Structures Amendment Act; and
 - iv. Local and district Municipalities are authorized to perform fire fighting services, as well as noise and air pollution in terms of remaining authorizations in terms of section 18 of the Municipal Structures Amendment Act.
- b) Municipalities also perform *assignments* of legislative and/or executive powers and functions on behalf of a National or Provincial executive (See sections 99, 126, 104, 44 and 156(4) of the Constitution). Chapter 3 of the Municipal Systems Act sets out the procedures

¹ It is technically extremely difficult to define the term "municipal service" in a precise manner. For the purposes of this document municipal services are defined narrowly as those functions and powers listed in terms of Schedules 4B and 5B of the Constitution.

² Note that District Municipalities have the same functions and powers as Local Municipalities in demarcated District Management Areas within their jurisdiction.

applicable for the establishment of such service arrangements. In addition section 27 of the Division of Revenue Act prescribes the consultation of the National treasury when such assignments are agreed.

- c) A number of *agency or delegation* arrangements exist where a municipality acts as the executive for the performance of a national or provincial function (see section 238 of the Constitution), or on behalf of another municipality; and
- d) Municipalities perform specific services on a *contractual* basis for defined beneficiaries (note that these have been transferred to superseding municipalities on the 5th of December 2000 in terms of the Establishment Notices).

2.4 The legal measures that regulate each of the above service categories are varied based on different legislative provisions and contractual agreements. The processes and mechanisms to establish change or amend the service or financial arrangements for each of the above service mechanisms are also varied for each of the service mechanisms. It is important to emphasise that different services are subject to different sets of procedural obligations. It is clear that uncertainty exist among municipalities and practitioners on the legal context regarding the various procedural obligations under which services are provided. As a result some confusion exists regarding which municipal entity has the legislative competence to set tariffs, adopt a tariff policy in terms of a by-law, financial rights and obligations, what consultative procedures to follow when services are restructured or what collective bargaining processes to follow.

2.5 Chapter 8 of the Act addresses municipal services and outlines determinations in respect of service tariffs, the provisioning of services, and service delivery. However, the provisions of section 78 of the Municipal Systems Act do not necessarily apply to all the services performed by municipalities, but only apply with regard to those services that are listed in terms of Schedule 4B of the Constitution. Yet, section 80, setting out the service delivery agreement through which delivery through external service mechanisms must be structured, is applicable to all municipal services.

2.6 The question now arises to which legislation circumscribes the procedural obligations and processes to those municipal functions falling outside the scope of section 78, but which should be reviewed to achieve the Constitutional objects of local government. Further work is still

required in this area to completely clarify this question.³ Two main views currently exist in those services falling outside the reach of section 78:

- a) The first view holds that a municipality has the authority and discretion to determine its own policy in terms of the Constitution on how it wants to render its services and perform its functions and powers.
- b) The second view holds that, existing legislation, insofar as it has not yet been revoked or is not in conflict with the Constitution, remains applicable and circumscribes the policy discretion of a municipality. The Municipal Ordinance and unrepealed legislation such as the Promotion of Local Government Affairs Act, No. 91 of 1983, as amended, would therefore remain applicable.

2.7 It is necessary to note that both (a) and (b) above are subject to the provisions of applicable sectoral legislation; such as for example the Water Services Act and the National Land Transport Transition Act, that circumscribe the restructuring services rendered by municipalities.

2.8 The remainder of this document will focus on the sections of Chapter 8 that specifically deals with “provision of services”. It is however important to refer continuously to the broader context of local public administration and municipal services as dealt with in both Chapters 7 & 8.

3. What does the Municipal Systems Act say about mechanisms for provision of services?

3.1 Section 76 of the Municipal Systems Act provides that a municipality may provide a municipal service in its area or part of its area through either an internal or an external mechanism and describes internal mechanisms as:

- (i) a department or other administrative unit within its administration;*
- (ii) any business unit devised by the municipality, provided it operates within the municipality's administration and under the control of the council in accordance with operational and performance criteria determined by council, or*
- (iii) any other component of (council's) administration.*

3.2 Section 76 then, without explicitly describing or defining external mechanism, indicates that a municipality may utilise external mechanisms for service provision, by entering into a service delivery agreement with a municipal entity⁴, another municipality, an organ of state, including a water committee, a licensed service provider registered and recognized in terms of national legislation, and a traditional authority. The section further outlines community based organisations, non-governmental organisations, or any other institution, entity or person legally competent to operate a business activity.

4. Towards a framework for consistent interpretation and implementation of the determinations of section 77 & 78 of the Act

4.1 When must a Local Authority apply section 78 of the Act? In answering this question it is important to identify the triggers for the application of section 78, but, also to explicitly identify when section 78 is not applicable.

4.2 Section 78 is applicable under the following circumstances:

- a) When a function is listed under part B of Schedule 4 to the Constitution; and
- b) When any one or more of the following circumstances, as outlined in section 77 apply:

SCHEDULE 4

Part B

The following local government matters to the extent set out in section 155(6)(a) and (7):

Air pollution
Building regulations
Childcare facilities
Electricity and gas reticulation
Fire fighting services
Local tourism
Municipal airports
Municipal planning
Municipal health services
Municipal public transport
Municipal public works only in respect of the needs of municipalities in the discharge of their responsibilities to administer functions specifically assigned to them under this Constitution or any other law
Pontoons, ferries, jetties, piers and harbours excluding the regulation of international and national shipping and matters related thereto
Storm water management systems in built-up areas
Trading regulations
Water and sanitation services limited to potable water supply systems and domestic wastewater and sewerage disposal systems

Preparing or reviewing its IDP;

- i) Providing a new municipal service (either in the whole or in a part of the area of the municipality);
- ii) Significantly upgrading, extending or improving an

⁴ The Municipal Systems Act defines a **municipal entity** as a “company, co-operative, trust, fund or any other corporate entity established in terms of any applicable national or provincial legislation and which operates under the ownership and control of one or more municipalities, and includes, in the case of a company under such ownership and control, any subsidiary of that company; or a service utility.”

existing municipal service (either a service provided in the whole or a part of the area of the municipality, or an upgrade, extension or improvement to the whole or a part of a municipal service);

- iii) Reviewing a delivery mechanism in the context of a performance evaluation;
- iv) The restructuring or reorganisation of the Local Authority in terms of the Municipal Structures Act (including the process of merging and restructuring the seven former municipal administrations into one administration);
- v) Following a request by the local community in terms of the Local Authority's community participation processes; or
- vi) An instruction from the provincial executive acting in terms of section 139 of the Constitution.

4.3 Section 78 is not applicable when the following circumstances apply:

- a) When the circumstances as outlined in section 77 above do not exist, even when a function forms part of Schedule 4B of the Constitution, then the municipality is not under an obligation to follow the section 78 process; or

SCHEDULE 5

Part B

The following local government matters to the extent set out for provinces in section 155(6)(a) and (7):

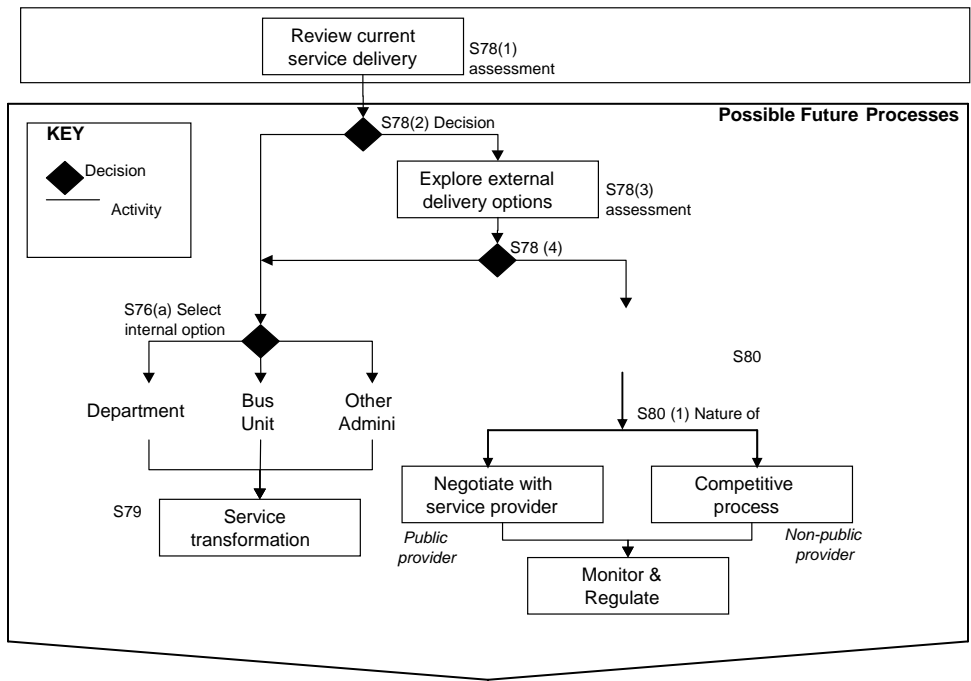
Beaches and amusement facilities
Billboards and the display of advertisements in public places
Cemeteries, funeral parlours and crematoria
Cleansing
Control of public nuisances
Control of undertakings that sell liquor to the public
Facilities for the accommodation, care and burial of animals
Fencing and fences
Licensing of dogs
Licensing and control of undertakings that sell food to the public
Local amenities
Local sport facilities
Markets
Municipal abattoirs
Municipal parks and recreation
Municipal roads
Noise pollution
Pounds
Public places
Refuse removal, refuse dumps and solid waste disposal
Street trading
Street lighting
Traffic and parking

- b) When a function is listed under part B of Schedule 5 to the Constitution; or
- c) When a functions is a support service such as general administration, information technology, financial services and human resource management; or
- d) A service is rendered in terms of an assignment; or
- e) A service is rendered in terms of a delegation or as an agency.

4.4 In circumstances where section 78 does not apply, the municipality can initiate a process and conduct an investigation in terms of its own policies and procedures, subject to applicable legislation. When a municipality does not follow the section 78 procedure then it should also consider the impact of the National Framework Agreement on Municipal Partnerships in defining an appropriate process. Also, municipalities are reminded that section 80 remains applicable should a municipality decide to implement an external service provider.

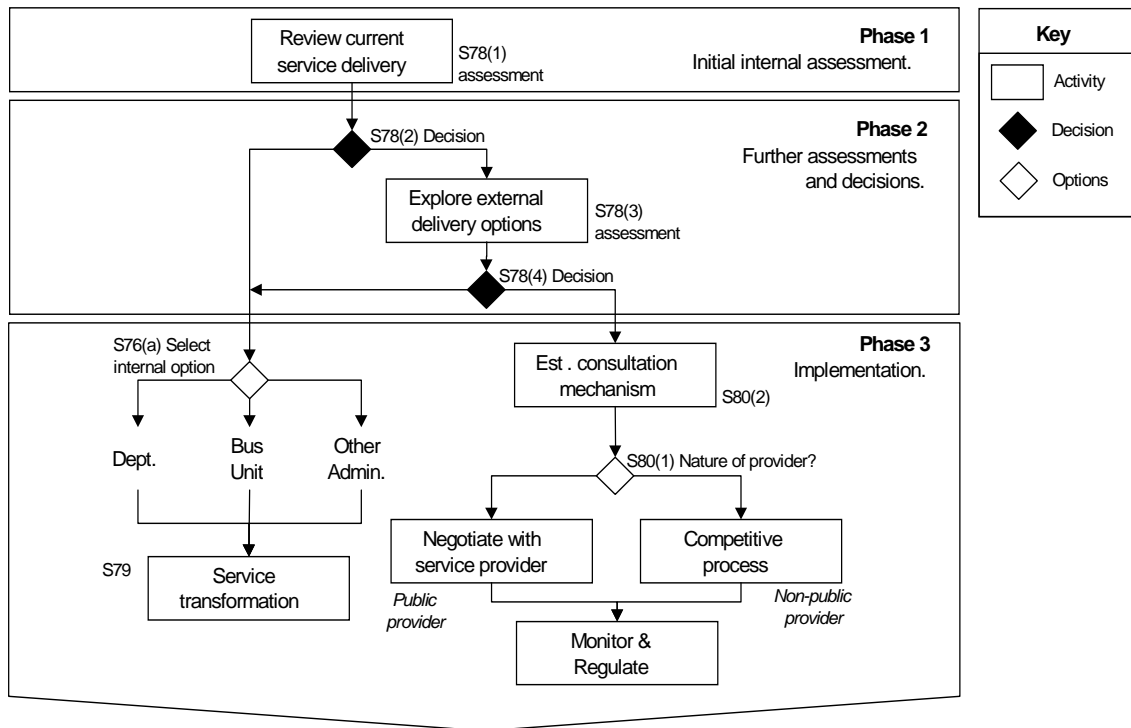
4.5 What are the assessment and decision steps in section 78?

Assessment and decision steps in terms of section 78



4.6 How does the section 78-process works?

Practical application of section 78



4.6.1 The process may be understood as taking place within *three distinct phases*, separated by Council decisions.

4.6.2 Phase 1 – Initial assessment

The Municipal Systems Act obliges a municipality to review service provision arrangements when preparing or reviewing its integrated development plan, when providing a new municipal service, when upgrading, extending or improving a service, when a performance evaluation requires a review, when municipal restructuring takes place, when requested by the local community or when instructed by provincial executive (Municipal Systems Act, 32 of 2000: Section 77)

In undertaking this review the Act requires municipalities to take the following *criteria* into account:

- direct and indirect costs and benefits;
- municipal capacity;

- potential for re-organization and HR development;
- impact on development, job creation and employment ;
- views of organized labour;
- trends in the provision of municipal services (Municipal Systems Act, 32 of 2000: Section 78(1)).

Following this review the Council should take a decision to

- decide on an appropriate *internal mechanism* to provide the service; or
- before it takes a decision on an appropriate mechanism, *explore the possibility of providing the service through an external mechanism.*⁵

It is extremely important to note Point IV of the Bargaining Council Circular (Non-Metropolitan) 17 of 1999, namely that should a municipality intent to privatize or to launch joint ventures, such a municipality must consult with the trade unions, IMATU and SAMWU. The consultation with the trade unions must commence as soon as the Council intends to privatize or launch joint ventures (see *Weclogo: Non-Metropolitan Circular No. 6 of 200, 24 January 2001*) This obligation is not binding on the City of Cape Town, but is binding on all other municipalities in the Western Cape (to be verified).

The nature of these internal and external mechanisms is spelled out in detail in the Act. Essentially though, an internal mechanism is defined as a department or administrative unit within the administration, or a business unit – provided that such a business unit operates within the municipality’s administration. All other options are defined as *external*, including other municipalities, CBOs, NGOs, private sector operators, and ‘municipal entities’, which include companies, trusts or other entities that are under the ownership control of the municipality (i.e. corporatised entities) and service utilities.

4.6.2 Phase 2 – Further assessments

In the event that a decision is taken to explore *external* mechanisms the Council is obliged to give notice to the local community of this decision, and then to assess the various service delivery options in terms of the same criteria utilized in the first phase of the process.

⁵ Note that an investigation in terms of section 78(1) does not actually allow the investigation of an external mechanism, nor does it allow the comparison of an internal mechanism with an external mechanism. However, an internal mechanism can be evaluated against the obligations and resource requirements placed upon a municipality in terms of section 79 of the Act, should it provide an internal service.

Following the review of external options the Council may decide to adopt an internal or an external service provision mechanism. Council's decision should be defensible in terms of both the process followed and the content of the arguments.

4.6.3 Phase 3 – Implementation

In the event that a decision is taken to utilise an *internal* service provision mechanism, the Systems Act requires the Council to allocate sufficient human, financial and other resources necessary for the proper provision of the service, and to transform the provision of that service in accordance with the requirements of this Act (Municipal Systems Act, 32 of 2000: Section 79).

Alternatively, the Council may elect to utilise an *external* mechanism, in which case it is obliged to establish a *consultation mechanism*, with which to consult with the community during the process of finalising the Service Delivery Agreement (SDA) between the municipality and the final service provider. The nature of the process will vary slightly depending on the nature of the selected service provider. Essentially, a decision to utilise a non-public service provider requires the Council to follow a competitive selection approach in accordance with the Preferential Procurement Policy Framework Act (No. 5 of 2000), while a decision to utilise a public service provider requires the Council to conclude the SDA through a less onerous negotiation process.

5. The creative use of Chapter 8 of the Municipal Systems Act

5.1 Provisions in terms of Chapter 8 of the Municipal Systems Act can be used creatively and an enabling manner to assist municipalities in addressing key service delivery and administrative challenges.

5.2 Creating predictability with regard to section 84(3) authorisations

5.2.1 A key problem that many district and local municipalities are facing relate to uncertainties with regard to the future of functions affected by section 18 and 84(3) authorisations in terms of the Municipal Structures Amendment Act. Key affected functions are potable water supply systems, bulk supply of electricity, domestic wastewater and sewerage disposal

systems and municipal health services. The tariff income from these services represents 54% of the total municipal revenue in non-metropolitan municipalities, is the most important cash flow source to local municipalities and employs a large proportion of staff (between 35 and 40% of local municipal staff).

5.2.2 Research based on the breakdown of municipal budgets in the various district areas has shown that the transfer of services currently performed by local municipalities in terms of section 84(3) would result in significant shifts of revenue and would necessitate major adjustments in rates income of between 29 and 67% in local municipalities. In addition it was shown that the possible shift of revenue due the changing or revocation of section 84(3) authorisations will seriously affect the ability of local municipalities to secure long-term loans due to the unpredictability of their income during the loan period. Further possible problems relates to the disruption and cost of transferring up to 40% of local municipal staff to district municipalities with section 84(3) revocations. Municipalities also experience problems in their organisational design processes and in preparing fixed-term contracts for municipal managers due to uncertainties relating to section 84(3) authorisations.

5.2.3 Section 78 of the Systems Act, however, provides a practical mechanism by which municipalities could create stability and predictability with regard to functions affected by authorisations. There is therefore no need to perpetuate further uncertainty with regard to the future performance of section 84(3) functions.

5.2.4 District and local municipalities can, in terms of section 80 of the Municipal Systems Act, after following a process in terms of section 78, agree to the continued rendering of water and sanitation services by local municipalities, even if section 84(3) authorisations are revoked. In effect local municipalities could become “external” service providers to the district municipalities.

5.2.5 The revocation of section 84(3) authorisations would transfer legislative and executive authority to district municipalities in terms of the division of functions as set out in section 84(1) of the Municipal Structures Amendment Act. However, this does not mean that district municipalities should perform these functions. The district municipality and affected local municipalities can, in terms of section 78 and 80 of the Municipal Systems Act agree that local municipalities can continue to perform such functions on behalf of the district municipality. Such an agreement would negate the need to transfer large numbers of staff,

create revenue stability and ensure long-term loans to municipalities. At the same time district municipalities would still be able to achieve all the policy objectives related to the vertical integration of the service, such as tariff equity and distribution of resources. This is because, as legislative authority, the district municipality will be able to determine tariffs and tariff policy. A section 80 agreement would also allow the district to receive a component of the tariff revenue for redistribution purposes.

5.3 Creating stability with regard to organisational design, preparing performance contracts for fixed term employment contracts and completing staff establishment.

- 5.3.1 By using the same logic outlined in paragraph 5.2 above municipalities can, by using inter-municipal service agreements in terms of section 80, provide predictability and stability with regard to a number of human resource matters.
- 5.3.2 A number of municipalities expressed concern with regard to the impact of the revocation of section 84(3) may have on their staff establishment process in terms of both section 51 and the Establishment Notices, as well as the content of performance contracts in terms of section 57 of the Act. In addition municipalities are required to factor in uncertainty when determining the roles and responsibilities in terms of section 53.
- 5.3.3 Section 80 service agreements can address such uncertainty by allowing district and local municipalities to plan the medium to long-term future of services.

5.4 Establishment of multi-jurisdictional service districts

- 5.4.1 The Municipal Systems Act also allows the use of its Chapter 8 procedures in other creative ways, such as for example the establishment of multi-jurisdictional service districts in terms of sections 87 to 93 of the Act.
- 5.4.2 This part of Chapter 8 effectively gives municipalities the ability to create a multi-municipal governance structure that could act as a service authority that oversees the work of external service provider bodies. In effect the Systems Act provides an alternative mechanism to municipalities in the establishment of water boards, transport authorities, health authorities etc.

5.5 It follows that municipalities have significant autonomy to determine, through inter-municipal agreements, on how the rendering of services and financial arrangements can be structured. Municipalities are provided with sufficient tools in terms of enabling legislation to allow creative solutions in establishing certainty, efficiency and stability in the new municipal dispensation.

6. Summary

- 6.1 Municipalities are under a Constitutional obligation to aggressively pursue the best way to render services in the interest of local communities;
- 6.2 A wide range of legislation impacts on the restructuring of different services. When investigating alternative services mechanisms the correct procedural context for each category of service must be used.
- 6.3 Section 78 of the Municipal Systems Act applies in specific circumstances and prescribes the decision procedures applicable in those circumstances.
- 6.4 Municipalities have large discretion to use enabling tools in the legislation to determine service delivery arrangements in their area.