



Local Government Working Paper Series No. 2

2006

LOCAL ACCOUNTABILITY: ENFORCING THE CODE OF CONDUCT FOR COUNCILLORS

Author: Jaap de Visser

Key words: local government autonomy, Constitution, disclosure of interests, meetings, outside work, duty of speaker, MEC's powers

The Local Government Working Paper Series disseminates policy and legal analyses to improve local governance in South Africa. The papers are short, preliminary studies intending to provide a brief look at relevant and timely topics. For additional information, please contact Dr Jaap de Visser at jdevisser@uwc.ac.za or visit the Local Government Project website at <http://www.communitylawcentre.org.za/Projects/Local-Government>

The opinions expressed in this paper are those of the authors. They do not necessarily represent the views of the Community Law Centre or the University of the Western Cape, nor should they be attributed to them.

Contents

1	Introduction.....	3
1.1	Local accountability.....	3
2	Code of Conduct.....	4
2.1	Preamble.....	4
2.2	General conduct and arrears to municipality.....	4
2.3	Attendance at council and committee meetings.....	4
2.4	Declaration and disclosure of interests.....	5
2.4.1	Financial interests and gifts.....	5
2.4.2	Personal interests in a council matter.....	5
2.4.3	Benefits from a contract with the municipality.....	5
2.5	Outside work.....	6
2.6	Personal gain.....	6
2.7	Bribery.....	6
2.8	Confidentiality.....	6
2.9	Interfering with administration.....	7
3	Enforcing the Code of Conduct.....	7
3.1	Speaker's duty to ensure compliance.....	8
3.2	Compliance in council's committees.....	8
3.3	Speaker's duty to investigate breaches.....	8
3.4	Council investigations into a breach of the Code of Conduct.....	8
3.5	Sanctions for breach of the Code of Conduct.....	9
3.6	Appeal to MEC against warning, reprimand or fine.....	9
3.7	MEC's power to investigate.....	10
4	Case study: enforcement of the Code of Conduct.....	10
4.1	Facts.....	10
4.2	MEC for local government's response to the allegation.....	10
4.3	Court's view on the MEC's response.....	10
5	Assessment of the law, the practice and the case study.....	11
5.1	'Local accountability first'.....	11
5.2	No local accountability without responsibility.....	11
5.3	What about the speaker?.....	12
5.4	Conclusion.....	13

1 Introduction

Local government is consolidating after the reforms around the 2000 elections. As it is steadily emerging as a strong partner of central and provincial governments, the issue of accountability and integrity of local government's public representatives is increasingly coming to the fore. A frequently articulated complaint is that instead of being community-centred and development-directed, municipalities have become inwardly-focused. The spate of protests around service delivery experienced in 2004 and 2005 in various municipalities in the Free State, Eastern Cape and Western Cape bear testimony to a sense of unease amongst communities over their public representatives' ability or willingness to be responsive to their needs.

A perceived lack of responsiveness on the part of councillors towards their citizens as well as perceived, alleged and proven cases of corruption and maladministration involving councillors all contribute to the perception that municipal councils are not accountable to their local communities. While it is generally accepted and often reiterated that the necessary legislation to ensure accountable local government is in place, the lack of enforcement of this legislation is often cited as the problem.

This paper focuses on the role of the council of a municipality towards ensuring accountable governance. First, it discusses the Code of Conduct for councillors, which is the key instrument at the hands of the municipal council to ensure accountability of the council and councillors. Second, it analyses the way in which the Code of Conduct can be enforced. Third, it presents a case study of an instance in which these instruments to enforce ethical conduct were invoked. Fourth, it provides an analysis of a key area where improvements can be made and proposes a way forward to making those improvements.

1.1 Local accountability

This review and assessment is conducted against the backdrop of an important principle, namely local government autonomy: local government has been established as a fully fledged sphere of government. It must stand on its own feet and partake in the national development exercise as a mature partner of national and provincial governments. The Constitution provides that local government is under a duty to pursue the object of providing "accountable government *for local communities*".¹ The Municipal Systems Act emphasises this by providing that the council has the duty to provide, without favour or prejudice, accountable government.² Similarly, it provides that members of the local community have the right to demand that the proceedings of the council and its committees are conducted impartially, without prejudice and untainted by personal self-interest.³

What emerges clearly from these fundamental provisions in local government's basic legislation is that the accountability is first and foremost linked to the municipality's own local communities. This is despite the fact that a variety of organs of state in various spheres of government are holding municipalities and councillors accountable in many ways. The provincial treasuries and departments of local government, national Treasury and Department of Provincial & Local Government, the Auditor-

¹ S 152(1)(a) Constitution (emphasis added).

² S 4(2)(b) Systems Act.

³ S 5(1)(e) Systems Act.

General, the National Prosecuting Authority all, in some way or another, hold municipalities and councillors accountable for the quality of their governance and the integrity of their actions. However, because the Constitution establishes municipalities as part of a distinctive sphere of government with their own assemblies of locally elected representatives, its intention is incontrovertible: a municipality's primary accountability is towards its citizens, thereby establishing the need for a framework for local accountability.

2 Code of Conduct

A key component of this framework for local accountability is the Code of Conduct for councillors, contained in the Municipal Systems Act. Before dealing with the issue of enforcement of the Code, it is appropriate to first outline the content of the Code.

2.1 Preamble

The Code's preamble makes clear that the Code of Conduct is not only concerned with the integrity of councillors but also with their accountability towards local communities.⁴ It provides that councillors are elected to represent local communities on municipal councils. They must ensure that municipalities have structured mechanisms of accountability to local communities and must meet the priority needs of communities by providing services equitably, effectively and sustainably within the means of the municipality. Further, councillors must be accountable to local communities and report back at least quarterly to constituencies on council matters, including the performance of the municipality in terms of established indicators.

2.2 General conduct and arrears to municipality

In general, councillors must perform their duties in good faith, honestly, in a transparent manner, in the best interest of the municipality and without compromising the municipality's credibility or integrity.⁵ A councillor may not be in arrears to the municipality for rates and service charges for a period longer than three months.⁶

2.3 Attendance at council and committee meetings

Councillors must attend meetings of the council or committees of which they are members unless they have obtained leave of absence or are required to withdraw from the meeting.⁷ Councillors can be granted leave of absence in terms of applicable national or provincial legislation or the council's rules and orders.⁸ The council may impose fines for a councillor not attending a meeting that he or she is required to attend or for a councillor failing to remain in attendance at such a meeting.⁹ However, failure to attend three or more consecutive council or committee meetings without having obtained leave of absence must result in removal from office of that councillor.¹⁰ The imposition of a fine or the removal from office must be conducted in

⁴ Preamble Schedule 1 Systems Act.

⁵ Item 2(a) and (b) Schedule 1 Systems Act.

⁶ Item 12A Schedule 1 Systems Act.

⁷ Item 3 Schedule 1 Systems Act. This provision does not apply to speakers, executive committee members or executive mayors attending subcouncil meetings. See section s 63(3) Structures Act.

⁸ Item 3(a) Schedule 1 Systems Act.

⁹ Items 4(1)(a) and (b) Schedule 1 Systems Act.

¹⁰ Item 4(2) Schedule 1 Systems Act.

accordance with a uniform standing procedure which each municipality must adopt. The procedure must comply with the rules of natural justice.¹¹

2.4 *Declaration and disclosure of interests*

2.4.1 Financial interests and gifts

Each councillor must, within 60 days of his or her election or appointment,¹² declare to the municipal manager, in writing, any of the following financial interests:

- (a) shares and securities in any company;
- (b) membership of any close corporation;
- (c) interest in any trust;
- (d) directorships;
- (e) partnerships;
- (f) other financial interests in any business undertaking;
- (g) employment and remuneration;
- (h) interest in property;
- (i) pension; and
- (j) subsidies, grants and sponsorships by any organisation.¹³

The same applies to gifts above an amount prescribed by the Minister for local government.¹⁴ Any change in the nature or detail of the financial interests of a councillor must be declared in writing to the municipal manager annually.¹⁵ The council must decide which of the financial interests must be made public having regard to the need for confidentiality and the public interest for disclosure.¹⁶

2.4.2 Personal interests in a council matter

A councillor must disclose any indirect or direct personal or business interest that he or she (or a spouse, partner or business associate) may have in matters before the council or its committees.¹⁷ Unless the council or committee decides that the interest is “trivial or irrelevant”, a councillor must withdraw from council or committee meetings about such matters.¹⁸

2.4.3 Benefits from a contract with the municipality

A councillor who acquired or stands to acquire any direct benefit from a contract concluded with the municipality must disclose full particulars of the benefit to the council. This must be done at the first council meeting at which it is possible to do so. The same obligation rests on a councillor whose spouse, partner, business associate or close family member acquired or stands to acquire any direct benefit from a contract concluded with the municipality.

¹¹ Item 4(3) Schedule 1 Systems Act.

¹² When a councillor is appointed as a local municipality’s representative to a district municipality, he or she must declare these interests to the district municipality (in addition to the declaration to the local municipality).

¹³ Item 7(1) Schedule 1 Systems Act.

¹⁴ Item 7(3) Schedule 1 Systems Act.

¹⁵ Item 7(2) Schedule 1 Systems Act.

¹⁶ Item 7(4) Schedule 1 Systems Act.

¹⁷ Item 5(1)(a) Schedule 1 Systems Act.

¹⁸ Item 5(1)(b) Schedule 1 Systems Act.

If the abovementioned benefit is acquired in common with other residents of the municipality, the abovementioned does not apply.¹⁹

2.5 *Outside work*

Full-time councillors are not permitted to engage in any other paid work without the consent of the council.²⁰ Any reasonable requests for such consent should be honoured by the council.

2.6 *Personal gain*

Councillors may not use their position, privileges or confidential information for private gain for themselves or to improperly benefit another person.²¹ The use of council facilities, properties, vehicles and allowances naturally falls within this provision. A councillor may not be a party to or a beneficiary under a contract for:

- (a) the provision of goods or services to the municipality; or
- (b) the performance of any work other than as a councillor for the municipality.²²

Similarly, a councillor may not obtain a financial interest in any business of the municipality or appear on behalf of any other person before the council or a committee in return for a fee or other consideration.²³

The council may, on a case by case basis, consent to a deviation from the above rules. If more than one quarter of the councillors objects to consent being given, the MEC for local government's approval is necessary for such consent.²⁴

A councillor may not use, take or acquire or benefit from any property or asset owned, controlled or managed by the municipality to which that councillor has no right.²⁵

2.7 *Bribery*

Councillors may not request, solicit or accept rewards, gifts or favours for:

- (a) (not) voting in a particular manner before a committee or before the council;
- (b) persuading the council or any committee in regard to the exercise of any power, function or duty;
- (c) making a representation to the council or any of its committees; or
- (d) disclosing privileged or confidential information.²⁶

2.8 *Confidentiality*

Without the consent of the council, councillors are not allowed to disclose privileged or confidential information of the council to unauthorised persons. Similarly, councillors are not allowed to disclose privileged or confidential information of a

¹⁹ Item 5(3) Schedule 1 Systems Act.

²⁰ Item 8 Schedule 1 Systems Act.

²¹ Item 6(1) Schedule 1 Systems Act.

²² Item 6(2)(a) Schedule 1 Systems Act.

²³ Items 6(2)(b) and (c) Schedule 1 Systems Act.

²⁴ Item 6(3) Schedule 1 Systems Act.

²⁵ Item 12 Schedule 1 Systems Act.

²⁶ Item 9 Schedule 1 Systems Act.

committee without the consent of that committee.²⁷ The Act provides that ‘privileged or confidential’ is information:

- (a) that is so declared by the council or a committee;
- (b) that is discussed in a closed session by the council or a committee. A closed session refers to a meeting of the council or of a committee which is being held behind closed doors.²⁸
- (c) that is declared privileged, confidential or secret in terms of law; or
- (d) disclosure of which would violate a person’s right to privacy.

This does not derogate from any rights to access to information in terms of national legislation.²⁹

2.9 *Interfering with administration*

The Code of Conduct prohibits a councillor from interfering in the administration of the municipality, unless the council has given the councillor a mandate.³⁰ The same applies to instructing any employee of the council without authorisation.³¹ Councillors may not obstruct the implementation of any council or committee decision or behave in such a way that would contribute to maladministration in the council.³² Exceptions to this rule can be formulated by law.³³

It is a criminal offence for a councillor to attempt to influence the municipal manager, any other staff member or an agent of a municipality not to enforce an obligation in terms of the Systems Act, other legislation, a by-law or a council decision.³⁴ The offence is punishable by a fine or imprisonment of up to two years.

3 **Enforcing the Code of Conduct**

As stated in the introduction, the perceived lack of responsive and accountable local government is not so much caused by inadequate or incomplete provisions on ethical conduct but rather in the lack of enforcement thereof. It is therefore necessary to address the issue as to how the Code of Conduct is enforced.

The Code contains various provisions dealing with enforcement. The role players in the enforcement are (1) the speaker, (2) the Council and the (3) MEC for local government.³⁵ The speaker plays a particularly pivotal role in the enforcement of the Code of Conduct for councillors. This role is determined by the statutory duties,

²⁷ Item 10 Schedule 1 Systems Act.

²⁸ See s 160(7) Constitution and s 20 Systems Act; see para 2.3.1.

²⁹ S 32 Constitution; Promotion of Access to Information Act 2 of 2000.

³⁰ Item 11(a) Schedule 1 Systems Act.

³¹ Item 11(b) Schedule 1 Systems Act.

³² Items 11(c) and (d) Schedule 1 Systems Act.

³³ Textually, this applies to all four of the above rules. However, few would argue that legislation could legally formulate exceptions to the rule that councillors should not obstruct council decisions or contribute to maladministration.

³⁴ S 119(1) of the Systems Act.

³⁵ Clearly, the Code of Conduct applies only to councillors and not to officials. This was reiterated in *Nala Local Municipality and another v Lejweleputswa District Municipality and others* 2005 (12) BCLR 1280 (O) at para 12 where the Court made it clear that the Code is not to be used to investigate conduct of municipal officials or consultants.

assigned to the speaker in the Structures Act³⁶ and the Code of Conduct, as well as the traditional role of speakers as guardians of the integrity of the legislatures.

3.1 *Speaker's duty to ensure compliance*

The Municipal Structures Act states that the speaker must ensure compliance with the Code of Conduct in the council and council committees.³⁷ He or she must ensure that every councillor receives a copy of the Code and that the Code is available wherever the council meets.³⁸

3.2 *Compliance in council's committees*

The speaker must ensure compliance with the Code of Conduct, not only in the council but also in council committees.³⁹ This means that the speaker must have a system of communication with the chairpersons of all council committees, including portfolio committees, the mayoral committee (in municipalities with an executive mayor), the executive committee (in municipalities with an executive committee) and *ad hoc* committees relating to Code of Conduct issues. These chairpersons should inform the speaker of issues related to the Code of Conduct. An example is the attendance by councillors of committee meetings.

3.3 *Speaker's duty to investigate breaches*

If the speaker has a reasonable suspicion that the Code of Conduct has been breached, he or she *must*:

- (a) authorise an investigation into the facts and circumstances of the alleged breach;
- (b) give the councillor an reasonable opportunity to respond in writing; and
- (c) report to a council meeting.⁴⁰

Importantly, the report must be open to the public.⁴¹ The speaker must report the outcome of the investigation to the MEC for local government. The Code does not provide clarity as to the *moment* of reporting to the MEC for local government, *i.e.* whether it must be done *before* or *after* the report to the council. However, it seems appropriate, in light of the principles of cooperative government that the MEC is informed after the council has had an opportunity to discuss the report.⁴²

3.4 *Council investigations into a breach of the Code of Conduct*

The municipal council can investigate and make a finding on an alleged breach of the Code.⁴³ It can also establish a special committee to investigate and make recommendations to the council.⁴⁴ Any investigation by the Council or a special committee into a breach of the Code by a councillor or traditional leader should be in accordance with the rules of natural justice.⁴⁵ That means that a fair hearing must take

³⁶ S 37(e) Structures Act.

³⁷ S 37(e) Structures Act.

³⁸ Item 13(4) Schedule 1 Systems Act.

³⁹ S 37(e) Structures Act.

⁴⁰ Item 13(1) Schedule 1 Systems Act.

⁴¹ Item 13(2) Schedule 1 Systems Act.

⁴² See also *Van Wyk v Uys* NO (2001) JOL 8976 (C) and the manner in which the principles of cooperative government were applied, see para 3.10.8.

⁴³ Item 14(1)(a) Schedule 1 Systems Act.

⁴⁴ Item 14(1)(b) Schedule 1 Systems Act.

⁴⁵ Item 14(7) Schedule 1 Systems Act.

place. The councillor concerned should be notified of the intended action to be taken against him or her and should be given a proper opportunity to be heard.

In *Nala v Lejweleputswa*, the Court distinguished between the speaker's investigation and the council investigation:

Clause 13(1)(a) of the Code only authorises the speaker to investigate "the facts and circumstances of the alleged breach". He would then have to submit a report of his findings to the council, which could then appoint a committee to investigate (...). [T]he provision does not envisage involvement of outsiders but (...) the initial investigation has to be conducted by the speaker himself and the investigating committee would comprise councillors only.⁴⁶

It follows from this interpretation that the investigation by the speaker is done by the speaker him- or herself without the involvement of other councillors. The council's investigation, however, involves a committee of councillors.

3.5 *Sanctions for breach of the Code of Conduct*

Ultimately, the Code of Conduct vests the authority to impose a sanction for breach of the Code of Conduct in the municipal council⁴⁷ or, alternatively, the MEC.⁴⁸ If the council or a special committee finds that a councillor has breached the Code of Conduct, the council can punish a councillor by:

- (a) issuing a formal warning;
- (b) reprimanding the councillor;
- (c) fining the councillor;
- (d) requesting the MEC to suspend the councillor for a period; or
- (e) requesting the MEC to remove the councillor from office.⁴⁹

Importantly, the council can thus not suspend or remove the councillor from office but can request the MEC to take such action. If the MEC finds that there was a breach and that the breach warrants a suspension or removal, he or she can take either action.⁵⁰

3.6 *Appeal to MEC against warning, reprimand or fine*

Councillors can appeal to the MEC against a warning, reprimand or fine issued by the municipal council.⁵¹ The appeal must be lodged within 14 days after the councillor was notified of the decision and a copy must be provided to the council.⁵² The council may, within 14 days of receipt of the appeal, make written representations to the MEC.⁵³ The MEC can, after having considered the appeal, confirm, set aside or vary the decision taken by the council.⁵⁴

⁴⁶ *Nala Local Municipality and another v Lejweleputswa District Municipality and others* 2005 (12) BCLR 1280 (O) at para 15.

⁴⁷ Item 14(2) Schedule 1 Systems Act.

⁴⁸ Item 14(6) Schedule 1 Systems Act.

⁴⁹ Item 14(2) Schedule 1 Systems Act.

⁵⁰ Item 14(6) Schedule 1 Systems Act.

⁵¹ Item 14(3)(a) Schedule 1 Systems Act.

⁵² Items 14(3)(a) and (b) Schedule 1 Systems Act.

⁵³ Item 14(3)(c) Schedule 1 Systems Act.

⁵⁴ Item 14(3)(d) Schedule 1 Systems Act.

3.7 *MEC's power to investigate*

The Code states that the MEC can appoint a person or committee to investigate any alleged breach and to recommend whether or not the councillor should be suspended or removed from office.⁵⁵ The Commissions Act,⁵⁶ or, where appropriate, applicable provincial legislation,⁵⁷ may be applied to such an investigation. Any investigation by the MEC into a breach of the Code by a councillor or traditional leader should be in accordance with the rules of natural justice.⁵⁸ That means that a fair hearing must take place. The councillor concerned should be notified of the intended action to be taken against him or her and should be given a proper opportunity to be heard.

4 **Case study: enforcement of the Code of Conduct**

The manner in which the provisions of the Code of Conduct have been drafted, raises questions around whose responsibility it is to investigate an alleged breach of the Code of Conduct. To whom are councillors accountable when it comes to the Code of Conduct? Are they accountable to the council or are they accountable to the MEC for local government?

4.1 *Facts*

This issue came under the spotlight in the High Court judgment on *Van Wyk v Uys*.⁵⁹ The case presented itself during the previous term of office of councillors. It concerned a conflict between the Western Cape provincial government and the Theewaterskloof municipality. The deputy mayor of Theewaterskloof municipality was alleged to have claimed for travel expenses that were in reality not incurred. Councillors raised the issue in council and also informed the MEC for local government.

4.2 *MEC for local government's response to the allegation*

The MEC proceeded to appoint an investigator under item 14(4) of the Code of Conduct. The municipality responded that the matter was already receiving council's attention: a subcommittee, headed by the speaker, had been appointed in terms of item 14(1) to investigate and make recommendations to council. The MEC found, however, that council was acting too slowly and he was of the view that the subcommittee consisted of members who were biased. He thus proceeded with the investigation. Pursuant to this investigation the MEC suspended the deputy-mayor in terms of item 14(6)(a) of the Code. In sum, the sequence of events showed that the MEC was first to institute an investigation in terms of the Code. He did not change his course of action or hold his horses after becoming aware of the fact that council had also instituted an internal investigation in terms of the Code.

4.3 *Court's view on the MEC's response*

Davis J, in handing down the judgement in *Van Wyk v Uys*, emphasised that item 14 must be interpreted in the context of cooperative government: the various spheres of

⁵⁵ Item 14(4) Schedule 1 Systems Act.

⁵⁶ Act 8 of 1947.

⁵⁷ For remarks on the application of provincial legislation, see *Nala Local Municipality and another v Lejweleputswa District Municipality and others* 2005 (12) BCLR 1280 (O) at para 11.

⁵⁸ Item 14(7) Schedule 1 Systems Act.

⁵⁹ *Van Wyk v Uys* NO (2001) JOL 8976 (C).

government need to coordinate and consult about their actions to enforce the Code. The Court understood item 14 to mean that, *only after the council requests the MEC in terms of item 14(6) to dismiss or suspend a councillor*, the MEC can use his or her powers of investigation under item 14(4) to assess that request. An MEC does not have the power to investigate and suspend on his or her own initiative. The MEC had no power to initiate the enquiry and suspend the councillor before the council had completed its own enquiry.

The MEC's argument for intervention was that the province would be otherwise powerless if a council refuses to act against an alleged contravention. This scenario is not entirely unlikely scenario if, for example, the councillor concerned occupies a high position in the council and uses his or her influence to keep council from acting in terms of the Code. However, the Court pointed out that the legislation offers the MEC other avenues to deal with such a situation. For example, section 106 of the Systems Act provides that the MEC must request information or designate a person to investigate if he or she suspects maladministration, fraud, corruption or other serious malpractice. In this case, the Court said, the MEC should have awaited the outcome of the council's investigation. If the outcome had been that council requested a suspension or removal (item 14(2)(c) or (e)), the MEC could have investigated the issue and decided on the matter. If the outcome of the council's investigation was considered unsatisfactory or if the MEC had problems with the composition of the subcommittee, he or she could have instituted action under section 106 of the Systems Act.

5 Assessment of the law, the practice and the case study

5.1 'Local accountability first'

The Cape High Court's judgment in the case study highlights the fundamental principle of 'local accountability first'. It puts beyond doubt that the provincial government cannot ignore internal disciplinary proceedings within the council to enforce the Code and persist with a provincial enquiry. To many of the disgruntled communities that experience a lack of accountability on the part of the council, this may come across as an unsatisfactory solution. However, the Court was also astute to a possibility that the council's proceedings could be inadequate or could produce untenable results. In that event, there are instruments available to the MEC for local government to investigate the misconduct on his or her own initiative. In this way, the Court carefully balances the relative autonomy of local government and the supervisory powers of the provincial government.

The rationale behind this scheme of powers is that a councillor's accountability exists primarily to the municipality (including its council and community) and not towards the MEC for local government. Municipalities must be allowed to use internal procedures to deal with alleged contraventions of the Code before the provincial government steps in.

5.2 No local accountability without responsibility

At this stage, it is important to highlight another dimension to the above approach to enforcement of the Code of Conduct. As indicated, it is based on the principle of local autonomy. This much vaunted autonomy, however, does not come without

responsibility. This is stressed by the Constitution when it deals with the objects of local government.⁶⁰ If municipalities rightfully seek to assert their right to deal with councillors' unethical behaviour in terms of internal procedures before the provincial government steps in, they must make sure that these internal procedures can foot the bill. It is in this area that significant gains must be made by many municipalities.

5.3 *What about the speaker?*

One of the aspects that deserve attention in terms of making those gains is the role and place of the office of the speaker. It is suggested here that municipalities should better utilise the institution of the municipal speaker, as created by the Municipal Structures Act, in order to safeguard the integrity of the council and of councillors. The speaker is presented by the legislation as the key municipal organ, responsible for upholding the integrity of council and of councillors. The speaker is vested with the important function of monitoring compliance with the Code of Conduct and initiating investigations into alleged misconduct. However, in line with the same principle of local government autonomy, the legislation leaves it to the individual municipality to regulate its internal affairs and adopt its own internal procedures to give effect to the internal enforcement of the Code of Conduct. Important in this respect are:

- (a) the terms of reference for political office bearers, such as the speaker, which a municipality is obliged to define;⁶¹
- (b) a municipality's delegation system, which, among other things, outlines any powers and functions which the council delegates to political office bearers, such as the speaker;⁶² and
- (c) a municipality's Rules and Orders, which is the by-law that prescribes its internal proceedings, including the role of the speaker.⁶³

It is not uncommon for municipalities to insist in the above documentation that the speaker reports to the mayor (executive or non-executive). This is informed by a notion of a hierarchy of office-bearers whereby the mayor appears at the top, followed by the speaker. It is, however, suggested that this is not in line with the intention of the legislation. The speaker, as chairperson of council meetings and guardian of the council's integrity is elected by the municipal council and should be held accountable by the same municipal council. The speaker should thus report to the municipal council. Inasmuch as sound governance practice would dictate that the offices of the speaker and the mayor coordinate their actions with one another, a hierarchy should not be automatically assumed. Political realities may very well dictate a hierarchy between the mayor and the speaker in that they may represent different levels of party seniority or represent senior and junior coalition partners to a ruling coalition. There is also no doubt that the mayor is the political head of the municipality. However, this hierarchy should not be decisive when it comes to the enforcement of the Code of Conduct for councillors. Every councillor, including a mayor, executive mayor, member of an executive committee or indeed a speaker, is subject to the Code of Conduct. Should a speaker find him- or herself under the continuous tutelage of a mayor, it would be difficult for him or her to monitor compliance with the Code of Conduct and initiate investigations into alleged misconduct without fear or favour. In

⁶⁰ See above under paragraph 1.1.

⁶¹ S 52(2) Systems Act.

⁶² S 59 Systems Act.

⁶³ S 160(6) Constitution.

this context, it is important to also stress that the legislation does not present the speaker as the final arbiter on the matters pertaining to the Code of Conduct. The speaker does not have the authority to sanction a councillor: this right is reserved for the council and the MEC for local government. In the same vein, it must be stressed that the speaker is accountable to the council: the speaker should be able to rely on the fair execution of his or her tasks in order to secure the continuation of his or her tenure in that office.

The Code of Conduct requires that a municipality adopts policies on a number of issues, including:

- (a) a standing procedure for the imposition of a fine or removal of a councillor as a sanction against non-attendance of meetings;⁶⁴
- (b) procedures and policy for the granting of leave of absence;⁶⁵ and
- (c) instances where council must decide on permission or consent to be granted to councillors, e.g. consent for outside work by full-time councillors,⁶⁶ permission to disclose information,⁶⁷ etc.

It would be in line with above interpretation of the speaker's role in the council that the speaker's office be entrusted with overseeing the preparation of these policies prior to their tabling in the council. Furthermore, the speaker should, for example, be in the best position to chair a committee of council that investigates transgressions of the Code of Conduct.

It is safe to say that at this stage of the development of local government institutions, the speaker's office is not yet regarded as the key guardian of the integrity of the council and of councillors. Communities and perhaps even the councillors themselves would often look at the mayor or even at the MEC for local government for solutions around alleged misconduct of councillors. Therefore, local government may be at a point where a choice should be made between two options:

- (a) If the role envisaged by the legislation for municipal speakers is not feasible, this role should be changed. This would mean that the legislative provisions on the role of the speaker should be revisited.
- (b) The other option, which should be the preferred one, is to ensure that the vision of the legislation on the role of the speaker is turned into a reality. This would mean that municipalities should, to the extent that they have not already done so, ensure that the office of the speaker is equipped to live up this task and that its independent role with regard to the Code of Conduct is respected. It is suggested that, only if the speaker's office is strengthened and entrusted with this task, it can build up the expertise, jurisprudence and knowledge required for it to be recognised as the legitimate guardian of the council's integrity by both communities and councillors.

5.4 Conclusion

This paper was premised on the principle of local accountability: developmental local government means that councillors are first and foremost accountable to their

⁶⁴ Item 4(3) Schedule 1 Systems Act.

⁶⁵ Item 3(a) Schedule 1 Systems Act.

⁶⁶ Item 8 Schedule 1 Systems Act.

⁶⁷ Item 10(1) Schedule 1 Systems Act.

constituencies, be it a ward or a municipal community. As the case study shows, municipal processes towards ensuring compliance with the Code of Conduct for councillors thus should be respected before the provincial government intervenes. However, if these municipal processes are inadequate or if they fail, the provincial government has a right and a duty to hold councillors accountable for their actions. It is therefore incumbent on municipalities to ensure that they have sound internal processes for ensuring ethical conduct of councillors and for following up on alleged transgressions. It is argued in this paper that the development of the institution of the speaker's office should not be overlooked in this regard.