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ROLES AND RESPONSIBILITIES OF THE MUNICIPAL MANAGER

Author: Jaap de Visser

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INTRODUCTORY REMARKS

The administrative head of the municipality is not escaping the wave of restructuring, renaming and transformation of local government structures. Coping with the new designation is probably the least important of the changes for the municipal manager. One of the key challenges in this respect is defining the roles of the municipal manager in relation to the executive committee or executive mayor of the municipality.

It is important to note, that against the backdrop a municipality's constitutionally protected right to regulate its internal affairs (s 160(1) and (6) of the Constitution), the most critical player in shaping the role and responsibility of the municipal manager is the council itself. As the employer, the council determines what it expects of a municipal manager.

However new legislation, such as the Local Government: Municipal Structures Act 117 of 1998 (the Structures Act) and, more importantly, the Local Government: Municipal Systems Act 32 of 2000 (the Systems Act) contains important provisions with legal powers, duties and obligations. This article explores the legal provisions in the new legislation that have a bearing on the functioning of the municipal manager. A variety of Acts will be referred to in this paper. However, most of the provisions referred to are in the Systems Act. Therefore, references to the Act are references to the Systems Act. After dealing with some introductory issues, this paper will discuss the contracts and terms of reference, the municipal manager's duties towards the council, his or her duties towards the public and the duties towards the administration.

TWO TYPES OF POWERS AND DUTIES

Powers and duties vested in the municipal manager

Some of the provisions discussed in this article impose duties directly on the municipal manager – for example, the Structures Act instructs the municipal manager to call a by-election when necessary and the Systems Act designates the municipal manager as responsible for submitting a report and recommendations to the newly elected council concerning delegations. These powers reside with the municipal manager and can only be exercised by him or her. The council cannot exercise those powers or delegate them to other functionaries or office-bearers.

Constitutionality

The argument could be raised that this compromises a municipality's constitutionally protected right to regulate its own internal affairs. With respect to this, it is important to note that in *Executive Council of the Western Cape v Minister for Provincial Affairs and Constitutional Development of the Republic of South Africa; Executive Council of KwaZulu-Natal v President of the Republic of South Africa and Others* 1999 (12) BCLR 1360 (CC) the obligation on a municipality to appoint a municipal manager was alleged to be unconstitutional. It was alleged to violate the municipality's right to regulate its internal affairs. The Constitutional Court dismissed this allegation and held that "the municipal manager is a key structure of a municipality and not merely a personnel appointment as contemplated in section 160(1)(d) of the Constitution". It is "permissible for national government to make provision for the appointment of the municipal manager in terms of section 155(7) of the Constitution", which authorises national government to enact legislation to regulate the exercise by

municipalities of their executive authority. The Constitutional Court listed some of the responsibilities that the Structures Act places directly on the municipal manager and was satisfied that national government could enact these (para 107-109). Therefore, there does not seem to be much scope for the argument that placing responsibilities directly on the municipal manager is unconstitutional per se.

Powers and duties vested in the municipality

Other provisions contain legal responsibilities imposed on the municipality *as a whole*. However, from the nature of the responsibility or power it appears that the onus is on the municipal manager to take initiative and play a leading role, subject to policy directions of the council. An example is the obligation on the municipality to maximise the efficiency of communication and decision-making within the administration (s 51(j)).

Municipal manager's accountability

Section 51(i) contains a paramount principle that should determine the municipality's course in moulding the role of its municipal manager. It states that the municipality must organise its administration in a manner that enables it to hold the municipal manager accountable for the overall performance of the municipality. This has two consequences:

- The council must have the tools to hold the municipal manager accountable, i.e. to demand explanation and to review his or her performance.
- The municipal manager must have the tools to answer to that accountability: the administration must be managed so that the municipal manager can account for the performance of the entire administration.

CONTRACTS AND TERMS OF REFERENCE

Prior to a discussion of the various relevant legal provisions containing duties and responsibilities for the municipal manager, it is necessary to deal with the internal documents that will, to a large extent, determine the expectations on a municipal manager. The Systems Act speaks of three crucial documents that will spell out the council's expectations of a municipal manager. These are:

1. the performance agreement, concluded each year by the municipal manager and the mayor or executive mayor on behalf of the municipality (s 57(1));
2. the employment contract, which must include "details of duties" (s 57(3));
3. the municipal manager's terms of reference - the council must define in precise terms the specific role and area of responsibilities of the municipal manager in a written document (s 53).

Performance agreement

The performance agreement must include the performance objectives and targets that the municipal manager must reach together with the timeframes within which this must happen (s 57(4)(a)). These are based on the municipality's integrated development plan (IDP) (s 57(5)). A system for the evaluation of the municipal manager's performance together with the consequences of unsatisfactory performance must also appear in the agreement (s 57(4)(b) and (c)). Importantly, it is within the council's discretion to determine which consequences apply to substandard performance of the municipal manager. However, the

Act is clear that the performance agreement be clear on the issue as to what those consequences are.

Employment contract

The employment contract is for a fixed term. The maximum term that is permitted stretches until two years after the election of the *next* council (s 57(6)), i.e. approximately 7 December 2007. The employment contract must include a provision for cancellation of the contract in the case of non-compliance *with the employment contract* (s 57(6)(b)). No municipal manager can be appointed without him or her signing the performance agreement (s 57(1)(b)). This does not mean that the employment contract and the performance agreement must be concluded at the same time. The performance agreement is separate from the employment contract and must be concluded *within a reasonable time after the appointment* (s 57(2)(a)) of a municipal manager. This means that municipalities are not legally bound to wait with appointing a municipal manager until the IDP process has resulted in the formulation of key performance indicators, strategies and targets. The employment contract can be concluded before that, provided that it caters for the consequences of substandard performance in terms of the performance agreement and it is concluded within a “reasonable time after appointment”..

The employment contract must, *where applicable*, provide for cancellation of the contract in reaction to substandard performance in terms of the performance agreement (s 57(6)(b)). The Systems Act does not compel a municipality to include cancellation of employment as a consequence of failure to fulfil the performance agreement. However, if cancellation of employment has been included in the performance agreement as a consequence of unsatisfactory performance, the employment contract must make that cancellation possible. And the cancellation would have to comply with the relevant provisions of the Labour Relations Act 1995.

Terms of reference

In this document, the council must define the relationship between the political structures, office bearers and the municipal manager and determine the manner in which they must interact - e.g. the establishment of an internal memo or reporting system (s 53). The lines of reporting and accountability must also be determined in that document. (e.g. does the municipal manager report to the council, to portfolio committees or to the (executive) mayor?). The terms of reference must provide a process for resolving disputes between the municipal manager and the political structures and office-bearers. The terms of reference may include delegations.

The role of the municipal manager is influenced by the type and by the category of municipality he or she serves. Hence, the Systems Act states that the document must be ‘appropriate to the category and type of municipality’.

DUTIES IN RELATION TO THE COUNCIL

Beginning of council’s term and by-elections

The municipal manager must call the first meeting of a newly elected council (s 29(2)). At that meeting, the municipal manager must preside over the election of the speaker (s 36(3)).

Each councillor must, within 60 days of the election or appointment, declare to the municipal manager, in writing, any financial interests held (item 7 of the Code of Conduct for Councillors in the Systems Act). The same applies to gifts that exceed the value of R350 and gifts received from a single source in one calendar year where the total value exceeds R350. These amounts were recently determined in regulations, issued by the Minister. A declaration of gifts received by a councillor must contain a description of such gift or gifts, as the case may be and indicate the value and source of such gift or gifts, as the case may be. 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 (item 7(4)).

If a by-election in a ward is necessary for one of the reasons mentioned in section 25(1) of the Structures Act, the municipal manager must call and set a date for the by-election, after consulting with the Independent Electoral Commission (s 25(3)).

Municipal manager as head of the administration

A municipality's administration is governed by the principles of section 195(1) of the Constitution (Batho Pele principles). Section 6(2) specifies these further and instructs the administration, for example, to take measures to prevent corruption, to give members of the community full and accurate information about the level and standard of service they are entitled to receive and about the (persons in charge of) municipal management. The municipal manager must see to the implementation of these principles in his or her administration. As head of the administration, the municipal manager is responsible, *subject to the policy directions of the council*, for the formation and development of an economical, effective, efficient and accountable administration that is equipped to implement the IDP, operates within the municipality's performance management system and is responsive to the needs of the local community to participate in municipal affairs (s 55(1)). Section 51 further states that the municipality must hold the municipal manager accountable for the overall performance of the administration (s 51(i)). When the Systems Act says that the municipality holds the municipal manager accountable, the onus is firstly on the council to hold the municipal manager accountable. Section 55(1) makes the municipal manager's responsibility subject to the policy directions of the council: the municipal manager is not responsible for the policy, but for its implementation.

It is suggested here that, in terms of a division between the executive committee or executive mayor and the municipal manager, the executive committee/mayor is responsible for ensuring that the municipal manager receives policy direction in terms of section 55 to effectively carry out the duties listed there.

Communication between council and administration

The municipal manager must manage the communication between the political structures and office-bearers and the administration (s 55(1)(j)). Instructions, queries and other communications from council, committees, the (executive) mayor or the speaker to the administration cannot bypass the municipal manager's office because the municipal manager is accountable for the entire municipal administration. In the event of communications going directly to officials or departments, the municipality would have to establish clear communication between those and the municipal manager to the level of detail required for the municipal manager to answer to his or her accountability towards the council. A delegation that has the effect of enabling the executive mayor or committee to issue

instructions directly to officials, other than the municipal manager, would effectively disable the accountability of the municipal manager towards the council (s 51) and therefore run contrary to the scheme envisaged by the legislation.

Communication between political structures

Section 44(1)(b) and 56(1) of the Structures Act stipulate that reports of portfolio committees must go to the executive committee/mayor respectively. If they can deal with the matter in terms of their delegated powers, they will do so or otherwise forward the report with recommendations, to the council. The municipal manager must manage this communication.

Advising the political structures

The municipal manager must advise the political structures and office-bearers. Particular issues where the municipal manager must render advice are:

- financial matters (eg financial considerations to proposed policies);
- issues related to the internal administration, such as human resources matters;
- policy matters; and
- legal and technical matters;

Implementation of legislation

The administration and implementation of the municipality's by-laws as well as the implementation of national and provincial legislation or assigned legislation is the responsibility of the municipal manager. When the council has passed a by-law, the municipal manager must ensure that:

- any structures, processes or mechanisms, provided for in the by-law are established; and
- the by-law is enforced through the sectoral functionaries of the municipality or, if necessary, the applicable courts of law.

Integrated Development Planning

The executive mayor, executive committee or a special committee (in a municipality of the 'plenary' type) manages the drafting of the IDP. Part of that duty is the assignment of responsibilities to the municipal manager (s 30). Section 30 clearly identifies the two primary actors in the IDP management. The executive mayor/committee or the IDP committee is under a legal duty to 'manage the IDP process'. Duties can only be assigned to the municipal manager. The municipal manager acts within the scope of these assignments. The initiative lies with the executive committee/mayor or IDP committee, who decides which responsibilities are to be delegated to the municipal manager. If a municipality decides to work with an IDP manager, the municipal manager will have to delegate to the IDP manager: the municipal manager remains accountable to the council.

These are some of the duties around the IDP suggested for assignment to the municipal manager:

- preparation of the IDP 'Process plan' - the process that the council intends to follow in drafting the IDP; see s 28 and *LGL Bulletin* 2001(1) at p 6 (the approval of the 'Process plan' could be delegated by council to the executive mayor/executive committee/IDP committee);

- day-to-day management of drafting process, including the ‘enforcement’ of time-frames;
- co-ordination and overall management of the planning process;
- communication to all relevant roleplayers;
- identification of other (sectoral) planning requirements and ensuring alignment with those (s 26(d) read with 29(1)(c) and 27(2)(a));
- response to public comments on IDP;
- establishment of the mechanisms for public participation; and
- documentation of the results coming out of the IDP process.

Once the IDP has been adopted (or amended), the municipal manager must ensure that, within 10 days, a copy of the IDP, together with other relevant documentation (s 32(1)(b)) is submitted to the MEC.

Performance management

The Systems Act places the ‘development of the performance management system’ in the hands of the executive mayor, executive committee or a special committee (s 39(b)). They must assign responsibilities to the municipal manager (s 39(c)). Similarly, sections 44(3)(a) and 56(3)(a) of the Municipal Structures Act place the responsibility for the development of criteria for evaluation, including key performance indicators, on the executive committee and the executive mayor respectively.

An important part of the development of the performance management system is the establishment of a process of regular reporting to council, other political structures, office bearers, staff, the public and appropriate organs of state, such as the provincial government (s 41(1)(e)). The municipal manager must implement and manage this reporting system and can advise the council on what kind of reporting system would best be adopted (at which intervals to which structures etc).

Implementation of performance management

A number of provisions in the Systems and Structures Act deal with this issue. Sections 44(3) and 56(3) of the Structures Act place a number of responsibilities in the hands of the executive committee/mayor, namely:

- evaluation of progress against the key performance indicators;
- review of the performance of the municipality; and
- monitoring of the municipality’s administration.

The Systems Act states that the performance of the municipality must be monitored, measures and reviewed at least once a year. (s 41(1)(c)). Regular reports must go to the council on the implementation of the performance management system (s 41(1)(e)). In view of the fact that the executive committee/mayor is charged by law with the above three, it appears that these structures must manage and drive the monitoring, measuring and reviewing exercises as well as the preparation of the reports to council.

The actual implementation of the performance management system would be most appropriately placed in the office of the municipal manager. Ultimately, ‘the municipality’ must be able to hold the municipal manager accountable for the overall performance of the administration (s 51). However, in view of the overlapping and, at times, confusing

provisions on the responsibilities regarding performance management, the executive committee/executive mayor's assignments to the municipal manager in terms of section 39(b) will prove to be of utmost importance to ensure clarity around the division of responsibilities.

Delegations

A newly elected council must be provided with a report on existing delegations. The municipal manager must provide this report together with recommended changes (s 65). This enables the council to review the system of delegations that it inherited from the previous council. The report must be submitted to the council 'through' the executive committee or the executive mayor (s 65(2)). The municipal manager drafts the report and submits it to the executive committee/mayor. Changes can be made there, provided that it is clear where changes have been made. The report that reaches the council cannot be a report of the executive committee/mayor in which the changes made to the municipal manager's draft have not been indicated. It is the municipal manager's responsibility to submit the report. The system of delegations is one of the most important pillars on which a municipal administration rests. The council, and not only the executive committee/mayor, should have knowledge of the municipal manager's recommendations. Therefore, the report to the council that eventually reaches the council must contain all the recommendations of the municipal manager.

Annual report

The municipal manager will have to drive the preparation of the Municipality's annual report (s 46). He or she must notify the community of a meeting on the annual report as well as the Auditor-General and the MEC. Importantly, the Systems Act states that the municipal manager must be available at the meeting to respond to questions, which can come from the council, but also from the Auditor-General or the MEC, since they have the right to attend and speak at the meeting (s 46(3)).

DUTIES IN RELATION TO THE PUBLIC

Responsive administration

The municipality must contribute to the building of capacity amongst its councillors and staff to foster participation (s 16(b)(ii)). The municipal manager plays a specific role, assigned to him by section 55(1)(a)(iii), which states that the municipal manager must ensure that the municipal administration is responsive to the needs of the local community to participate in the affairs of the municipality. The Systems Act envisages the municipal manager to ensure that the administration is open to, and facilitates the input of local communities and residents in municipal affairs. An example is that the Systems Act specifically instructs the municipal manager to devise a mechanism to assess the satisfaction of the community with the municipal services (s 55(1)(o)).

Importantly, section 51 states that the administration must be structured in such a way so as to enable 'the municipality' to hold the municipal manager accountable. The municipality consists of the political structures, the administration and the community (s 2(b)). Therefore, the Systems Act also envisages a role for the community and for the administration to hold the municipal manager accountable for the performance of the administration. This should

not be interpreted as a right for ‘the community’ or ‘the administration’ to interfere with the municipal manager’s functioning or to call the municipal manager to book. However, it does entitle the community and the administration to a municipal manager’s office that is transparent, answers queries and engages with the municipal administration and the larger local community. For example, the transparency requirement is reflected in section 58 where the municipality is instructed to publish the salary scales and benefits of the municipal manager.

Public participation mechanisms

The onus is on the municipality to put in place mechanisms and processes to enable public participation (s 17(2)). The council must decide on the kind of processes it wants to establish. Subsequently, it is the municipal manager’s responsibility to implement that decision and set up those mechanisms. Section 55(1)(n) states that the facilitation of public participation is an aspect of the implementation of the IDP for which the municipal manager is responsible. The obligation on the municipality to have someone available to assist persons who cannot write in putting comments in writing (s 21(4)) is something for which the municipal manager must take responsibility.

The executive committee or executive mayor is responsible for reporting to the Council on the involvement of communities in municipal affairs. The executive committee or executive mayor is also charged with ensuring that public views are taken into account and with the reporting on the effects of public participation on decision-making (ss 44 and 56 of the Structures Act).

Communication

The municipal manager has to ensure that the relevant information regarding public participation is communicated to the local community (s 18). A critical responsibility of the municipal manager is the publication of various notices. The Systems Act entails quite a number of requirements where notices must be published or communications must go out. The Act mostly refers to ‘the municipality’ as being responsible for the communication but sometimes the responsibility is assigned directly to the municipal manager:

- The municipal manager must give notice to the public of the time, date and venue of council meetings (s 19);
- The municipal manager must notify the public (as well as the Auditor-General and the MEC) of meetings at which the municipality’s annual report will be discussed (s 46(3)(a))
- Copies of the annual report must be submitted to the MEC, Auditor-General and other prescribed institutions (s 46(4)(b));
- Copies of the annual report must be available to the public, interested organisations and the media (s 46(4)(a));
- Proposed by-laws must be published for public comment (s 12)
- Adopted by-laws must be published in the Provincial Gazette and in a local newspaper (s 13);
- The municipality must keep and maintain a compilation of its by-laws (Municipal Code) (s 15);

- Every notice that was published in the *Provincial Gazette* must be displayed at the municipal offices (s 21(3));
- The community must be notified of the IDP process that the council intends to follow (s 28(3))
- The community must be notified of the adoption of IDP and copies and a summary must be made available (s 25(4));
- Reporting to the public on the performance management system (s 41(e)(ii)).
- The municipality must communicate its key performance indicators and performance targets to the public (s 44).
- The municipal manager must ensure that those parts of the Code of Conduct for staff members that affect the local community are communicated to the public (s 70(2)(b)).

Appeals

Appeals against decisions taken by the council, or against decisions taken in terms of powers delegated to a committee, office-bearer or staff member must be directed to the municipal manager (s 62(1)). The municipal manager must immediately submit the appeal to the relevant authority. Section 62(4) gives guidelines as to which authority must deal with the appeal.

The municipal manager is the appeal authority and must deal with the appeal if it is lodged against a decision taken by a staff member other than the municipal manager him or herself. In that case, he or she must consider the appeal and can confirm, change or withdraw the decision. The appeal must start within 6 weeks after it has been lodged and it must be decided within a reasonable time.

Service delivery

The municipal manager is responsible for the provision of services to the local community in a sustainable and equitable manner and must develop and maintain a system to assess the satisfaction of the community with the municipal services (s 55(1)(d) and (o)). The Municipal Structures Act states that the executive committee or executive mayor must 'oversee' the sustainable provision of services (ss 44(3)(e) and 56(3)(e) of the Structures Act).

DUTIES IN RELATION TO THE ADMINISTRATION

The municipal manager is responsible, subject to the policy direction of the council, for the management of the administration in accordance with the Systems Act and other applicable legislation (s 55(1)(b)). Importantly, the municipal manager is tasked with the implementation of the IDP and with the monitoring of progress with the implementation of the plan (s 55(1)(c)).

Section 51 lists the general responsibilities of the municipality with regard to the administration. The onus is on the municipal manager, as head of the administration, to see to the implementation of these principles and values in his or her administration. Critically, section 51(d) stipulates that all staff and councillors must align their roles and responsibilities with the priorities and objectives of the IDP. The municipal manager must ensure that

everyone within the administration contributes towards the implementation of the municipality's IDP.

Importantly, the Code of Conduct for councillors states that an individual councillor may not interfere in the management or administration of any department of the council, unless the council mandated that councillor (item 11(a)). Individual councillors cannot give instructions to employees without authorisation of the council (item 11(b)).

Staff matters

The municipal manager deals with staff matters, such as appointment of staff (s 55(1)(e), (evaluation and review of) staff establishment (s 66(1)(a) and (d)), job descriptions (s 66(1)(b)), remuneration (s 66(1)(c)), staff discipline (s 55(1)(g)), training (s 55(1)(f)), labour relations (s 55(1)(h)). He or she has to exercise these subject to the policy directions of the council. However, the fact that the Systems Act assigns these duties directly to the municipal manager is important: the Act envisages the municipal manager to manage day-to-day staff matters. The role of the council is to provide the policy framework and give political direction. This policy direction should come from the executive mayor or executive committee, which must 'monitor the management of the municipality's administration' (ss 44(3)(d) and 56(3)(d) of the Structures Act) and review its performance (ss 44(3)(c) and 56(3)(c) of the Structures Act).

Importantly, the Systems Act makes the municipal manager responsible for the *appointment* of staff. The Systems Act specifically circumscribes the municipal manager's discretion by subjecting it to the policy directions of the municipal council (s 55(1)) and the Employment Equity Act 55 of 1998. It is submitted that the executive committee or the executive mayor determines the policy direction on staff appointments. However, the Systems Act vests the responsibility for *individual appointments* in the municipal manager. He or she has the discretion to take these decisions, provided that it takes place within the policy provided by the executive committee/mayor. These provisions do not apply to the managers that are directly accountable to the municipal manager.

Senior management

The council must appoint the managers, referred to above. The council must first consult the municipal manager (s 56), who eventually enters into performance contracts with the managers accountable to him or her (s 57). This represents a balance between the council's interest in appointing a senior management team to drive its IDP goals on the one side and, on the other side, the municipal manager's interest in having an opportunity to influence the appointment and subsequently institutionalising what is expected of the manager in a separate performance agreement.

Finances

As accounting officer, the municipal manager is responsible for all income and expenditure, all assets and discharge of liabilities of the municipality and the compliance with the municipal finance management legislation. The Municipal Finance Management Act has not been enacted and section 10G of the Local Government Transition Act is applicable until then. The Municipal Finance Management Bill (MFMB), once enacted, will be one of the most critical pieces of legislation for municipal managers. A thorough examination of its content and implication falls outside the purview of this article. Suffice to say that the most

recent version of the MFMB places important duties in relation to financial management, internal control, auditing, financial records and statements, internal and external reporting obligations directly on the municipal manager as the accounting officer for the municipality. Importantly, the Bill states that the mayor, executive mayor or designated councillor (if none of these apply) is responsible for the preparation, drafting (including public participation) and tabling of the annual budget (s 15). This responsibility will include the delegation of responsibilities in this respect to the municipal manager or the treasury office.

Code of Conduct

The municipal manager must ensure that each staff member receives a copy of the Code of Conduct for staff members and that the Code of Conduct is explained to staff members who cannot read (s 70).