

## EXECUTIVE COMMITTEES

# Proportional or 'fair' representation?

The recent debate over plans to change the type of government in the City of Cape Town raised some interesting questions about the composition of executive committees. It is often assumed that an executive committee (Exco) must be based on proportional representation, with seats automatically assigned according to the representation of each party in the municipal council. While this is possible, and in most cases desirable, the courts have held that it is an option open to the municipal council but not an imperative.

Section 43 of the Local Government: Municipal Structures Act specifically addresses the composition of an executive committee. It states:

### **Composition of executive committees:**

- (1) If the council of a municipality establishes an executive committee, it must elect a number of councillors necessary for effective and efficient government, provided that no more than 20 percent of the councillors or 10 councillors, whichever is the least, are elected. An executive committee may not have less than three members.
- (2) An executive committee must be composed in such a way that parties and interests represented in the municipal council are represented in the executive committee in substantially the same proportion they are represented in the council.
- (3) A municipal council may determine any alternative mechanism for the election of an executive committee, provided it complies with section 160(8) of the Constitution.

Section 160(8) of the Constitution states the general principles that apply to all proceedings of a municipal council. For an alternative mechanism determined in terms of section 43(3) of the Municipal Structures Act to comply with section 160(8) of the Constitution, it must allow for the different parties and interests on council to be "fairly represented". Secondly, the alternative mechanism must be "consistent with democracy".

### **Dispute**

In *Democratic Alliance v ANC & Others* [2002] JOL 10389, the Cape High Court was required to rule on whether Exco appointments must result in proportional representation.

At its first meeting on 15 December 2000, the City of Cape Town council had adopted a resolution relating to the composition of its Exco. The mechanism provided that the council would elect the first eight members of the Exco. If, after such election, certain parties or interests were not fairly

# key points

- Municipal councils are permitted to constitute their executive committees based on proportional representation.
- However, the Municipal Structures Act allows a council to adopt an alternative mechanism that may be better suited to the particular circumstances of a specific municipality.
- This alternative mechanism does not need to result in proportionality.
- While a municipal council has considerable leeway in designing such an alternative, the mechanism selected must result in fair representation of the parties and interests in the municipal council on the Exco.

represented as required by section 160(8) of the Constitution, the remaining two seats would be reserved for such parties or interests. The court described the mechanism as a “winner-takes-all” system in which the portfolio seats on the executive committee were allocated to councillors from the ruling party or alliance.

As a result of floor-crossing in 2002, the Democratic Alliance (DA) lost control of the Cape Town municipal council to an alliance of the African National Congress (ANC) and the New National Party (NNP). The speaker of the council convened a meeting at which the council reconstituted its Exco. The application of the above-mentioned formula meant that the DA, which retained 71 seats on council, was left with the two non-portfolio seats while the ANC, with 80 seats, held the mayoral seat and four other portfolio seats on the Exco. Members of the NNP were elected to the three remaining portfolio seats even though the NNP only had 32 seats on council.

It is clear that the Cape Town resolution did not result in proportional representation. Accordingly, the DA asked the court to determine if the mechanism and the result complied with section 43 of the Municipal Structures Act and with the Constitution.

## Arguments

The DA conceded that a mechanism that did not result in proportional representation could still be consistent with democracy. However, it argued that “fair representation” required that the outcome of whatever mechanism was chosen should have some rational relationship to the representation of each party in council.

In support of this proposition, the DA argued that a winner-takes-all system was incompatible with fair representation.

Secondly, it argued that “a multi-party system of democracy”, which is listed as a founding value in section 1 of the Constitution, underscored the importance of political parties, including minority parties.

Thirdly, the DA argued that section 43(2) of the Municipal Structures Act dealt with the outcome of the election of executive committee members, while section 43(3) dealt with the mechanism used to arrive at the outcome.

Accordingly, even though section 43(3) allowed council to choose an alternative mechanism for electing members to the Exco, this still had to result in proportional representation as required by section 43(2).

In response, the ANC argued that it was only on the basis of section 43(2) that the DA could claim an entitlement to any specific number of seats and that section 43(3) did not provide any details on the nature of the alternative mechanism.

They submitted that the DA’s argument meant that “fair representation” was the same as “proportional representation”, which was not the intention of the legislation, as section 43(3) purported to provide an alternative to “proportional representation”.

## Decision

The court disagreed with the DA and emphasised that section 43 provided municipal councils with two distinct options.

The first option was to establish an executive committee based on proportional representation.

The second option was to adopt an alternative mechanism for electing members to the executive council.

This alternative mechanism did not need to result in proportionality. This had been done in Cape Town. In essence, if fair representation meant the same as proportional representation, there would have been no need for section 43(3) as both section 43(2) and 43(3) would lead to the same result. Therefore, section 43(3) only made sense if it meant that municipal councils were allowed to use a mechanism that did not result in proportional representation.

The court found that there were no specific restraints on the council's choices under the second option. However, section 160(8) required that the outcome of whatever mechanism was chosen had to be "consistent with democracy" and fairly represent the parties and interests in the council.

Specifically, the court determined that the mechanism chosen did not need to result in proportional representation for it to be consistent with democracy. The court relied on a previous decision of the Constitutional Court in which it had held that proportional representation was one of many electoral systems that would be consistent with democracy.

## Comment

It is clear that municipal councils are permitted to constitute their executive committees based on proportional representation. In fact, this is the default position provided in the Municipal Structures Act. A municipality is therefore expected to use a mechanism that would result in proportional representation unless it has adopted a resolution or passed a by-law establishing an alternative mechanism.

It could even be argued that a system that results in proportional representation is more democratic in that it allows a better correlation between the results of the elections and the power of a party or interest in the governance of the municipal council: that is, a party that won 40% of the votes would hold about 40% of the seats on Exco. A proportional representation mechanism may also be preferred because it allows for more varied perspectives and interests to be considered in the Exco's decision-making process.

**While the Municipal Structures Act allows a municipal council to constitute its Exco in terms of an alternative mechanism, a municipality is expected to use a mechanism that would result in proportional representation unless it has adopted a resolution or passed a by-law establishing such an alternative mechanism.**

However, the legislation allows the council to adopt an alternative mechanism that may be better suited to the particular circumstances of a specific municipality. While the council has considerable leeway in designing an alternative mechanism, the mechanism selected must result in fair representation of the parties and interests in the municipal council.

The court made two important comments regarding the analysis in cases of this kind.

First, it agreed that the principles of majority rule enshrined in the Constitution entitled the controlling alliance or party to govern the municipality.

Second, it recommended a conservative role for courts in ruling on such matters.

As long as the requirement that parties be provided a fair opportunity to participate in the governance of a municipality has been satisfied, courts should be loath to interfere with local government decisions regarding the composition of their committees.

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