PROFESSIONALISATION OF LOCAL GOVERNMENT: A CRITICAL EXAMINATION OF THE COMPETENCY FRAMEWORK FOR MUNICIPAL OFFICIALS

Author & Presenter: Phindile Ntliziywana LLB LLM – Researcher, Community Law Centre, University of the Western Cape.

Abstract
This paper provides a brief introduction to the recent history of local government, with particular focus on the legislative and policy developments in the past ten years. It discusses the overhaul of local government from a multiplicity of fragmented institutions that provided inequitable services to communities, and thus led to massive inequalities, to a wall-to-wall system designed to deliver service across the length and breadth of South Africa and thus realise a better life for all. The progress made by municipalities in the past ten years, in redressing the massive inequalities created by a racially configured local government is remarkable. However, the challenges remain huge and some of these can be attributed to lack of the necessary capacity to fulfil this new constitutional vision of local government. Evidence of the failure to meet service delivery targets; the concomitant popular discontent, and the adverse audit reports, all pay testimony to the frustrated vision. This paper examines the legislative and policy response of national government in professionalising local government administration and thus addressing the capacity deficit and skills shortage prevalent at local government. Firstly, this paper looks at the professionalisation attempts of the then DPLG through the Regulations which focussed on the outcomes and performance. Secondly, an examination of the Treasury Regulations is undertaken. The new things it introduces and the gaps it seeks to fill in the DPLG’s Regulations are brought to the fore. Lastly, efforts by the renamed COGTA at professionalisation of local government administration through the introduction of the Municipal Systems Amendment Bill and what they seek to remedy, which is not remedied by the two previous professionalisation attempts, are critically examined. This paper critically examines these initiatives, legal and factual, and assess whether they have and will solve the problems besetting local government. The factual examination of these initiatives assesses the success thereof and the future practical hurdles that might hamper the realistic implementation of these initiatives. A legal examination, in turn, looks at the enforceability of these initiatives and assesses whether these parallel attempts might lead to conflicts.
1 Introduction
Sixteen years since the advent of democracy and ten years into the operation of an entirely new local government dispensation, local government in South Africa is in a critical phase. On the one hand, local government has not only survived a fundamental restructuring but has also made great strides towards extending service delivery and development to marginalised communities. In thirteen years, local government has emerged from being an institution that was racially configured, only covering urban nodes which resulted in massive inequalities, to an institution with democratically elected leadership, constitutional status and a developmental agenda. On the other hand, as expectations of local government service delivery, quite correctly, have risen, it has become evident that the broader transformation of local government is by no means complete, thus the interventions by various government departments.

The aim of this paper is twofold. Firstly, it provides a brief introduction to the recent history of local government in South Africa. This cover the period before 2000 which saw a radical transformation and overhaul of local government accompanied by a rationalisation of over a thousand race-based municipalities to 264 municipalities by the end of 2000. It also covers the ten years into the operation of an entirely new local government dispensation. Secondly, it examines some fault lines in the design and functioning of the new system of local government, focusing on the capacity constraints and skills deficit at local government level. The government’s attempts in professionalising local government and thus addressing the skills shortage are critically examined. Where possible, suggestions are made for a change of direction. It is hoped that this discussion of the local government professionalisation framework, as well as some of its major challenges, may make a positive contribution to the search for avenues of improvement.

2 The recent history of local government

2.1 Pre-2000
The period before 2000 saw a radical transformation and overhaul of local government from over a thousand race-based, illegitimate and subservient municipalities to 264 wall-to-wall municipalities designed to deliver service across the length and breadth of South Africa and thus realise a better life for all\(^1\). Before 1994, local government was characterised by a multiplicity of fragmented institutions that provided massively inequitable services to communities.\(^2\) This unequal distribution of services was occasioned by the fact that these fragmented institutions were racially configured.\(^3\) They mainly covered urban nodes and this

\(^{1}\) Johnson, Victoria 2004: 1.


meant that many rural areas fell outside of the jurisdiction of municipalities.\(^4\) Those local authorities found in black areas were expected to generate their own revenue to maintain themselves, while the resources were diverted to white areas.\(^5\) This created skewed patterns of development, resulting in massive infrastructure backlog and lack of capacity and skills in black and rural areas.\(^6\)

The new constitutional order, heralded by the 1996 Constitution, significantly improved the status of local government.\(^7\) Local government is now a fully-fledged sphere of government with powers derived directly from, and protected by, the Constitution.\(^8\) The Constitution repositions local government as an equal partner in the intergovernmental arena. Most importantly, the Constitution confers a new mandate on local government with both service delivery and developmental elements to it in order that local government can improve the lives of all who now fall under local government and thus redress the inequalities created by the skewed patterns of development in the past. Local government is now the important point where services have to be rendered as it is a point of contact between the governor and the governed.\(^9\) This therefore requires the governor to possess the necessary skills in order to effectively deliver those services and thus redress the past imbalances.

### 2.2 Local government Post-2000

With the transformation of local government now complete, municipalities were expected to fulfill the Constitutional promise of delivering services across the length and breadth of South Africa and thus realise a better life for all. Strides have been made in this regard in the past ten year, but challenges remain huge and pronounced. Accordingly, the enhanced status of local government notwithstanding, the efficiency of municipalities in discharging their service delivery obligations leaves much to be desired. This much is apparent from the poor service delivery record of municipalities and the concomitant popular discontentment in the form of violent protests and rates withholding; and the adverse audit reports which have resulted in widespread interventions by provinces. Local government has failed to live up to its Constitutional vision.

The root cause of the problems besetting local government partly lies in the appointment of staff with inadequate formal qualifications, expertise and experience.\(^10\) There are two reasons for the appointment of unsuitable candidates. The first is the cadreship deployment practice

---


\(^7\) Mquma Local Municipality para 42.

\(^8\) S 40(1) of the Constitution; Fedsure Life Assurance paras 38 and 126.

\(^9\) Beck v Kopanong Local Municipality para 18.

\(^10\) Atkinson “Taking to the Streets” in State of the Nation South Africa 61.
the excesses of which were laid bare in the *Mlokotif* case. In the *Mlokoti* case the best qualified person was overlooked for appointment by the Amathole District Municipality which, instead, appointed a person not suitably qualified because of political interference detailed in the judgment. The second reason the municipal councils fail to appoint suitable candidates is the phenomenon of the council’s capture by local elite which then demands the appointment of people favourably disposed to them regardless of whether or not they possess the requisite skills. All this is done despite the fact that municipalities are complex organisations that require a cadre of leadership with sound organisational experience, “familiar with overseeing large organisations, substantial budgets, complex legal requirements, and sophisticated technical decision-making”, for their effectiveness. This is especially the case in South Africa where this sphere of government is governed by a web of legislation, prompting one author to describe the phenomenon as ‘strangulation of local government’. The system of local government that has been put in place in South Africa requires skilled administrators “with a combination of managerial competence, organisational savvy and political sensitivity to perform their functions effectively as champions of fundamental change”.

3 National legislative intervention

3.1 Intervention of the Department of Provincial and Local government

The then Department of Provincial and Local Government responded to the capacity constraints facing local government by attempting to professionalise local government. This it does by issuing regulations (Performance Regulations) which contain a framework for competency requirements and basic job descriptions for the posts of municipal managers and managers accountable to them, among other things. The focus of these regulations is on outcomes and performance. These regulations require employment contracts and performance agreements of the new and existing municipal managers and managers directly accountable to them to be managed in terms of higher education qualification, work related experience, as well as core managerial and occupational competencies. Accordingly, the regulations make it an inherent requirement of the job that a municipal manager must have a recognised bachelors degree in a relevant field, five years relevant experience and core managerial and occupational competencies.

---

12 Atkinson “Taking to the Streets” in *State of the Nation South Africa* 61.
13 Steytler “Strangulation of Local Government: Stifling innovation, experience and local responsiveness” 2008 10(1) *Local Government Bulletin* 6-8. This relates to the concern that municipalities are inundated with a torrent of prescriptive and complex legislation regulating their functioning. The sheer volume, style, nature and scope of the legislative framework is naturally not user friendly to officials lacking the requisite expertise.
The Performance regulations contain an enforcement mechanism to the effect that the employment contract of the municipal manager and managers directly accountable to the municipal manager must be cancelled in the event of non-compliance with the competency framework.\(^\text{16}\) In this light, the validity of the contracts of the municipal manager and other senior managers is subject to the submission of original certificates or certified copies of their academic and professional qualifications and proof of previous employment prior to the signing of the employment contract.\(^\text{17}\) This and other information must be lodged with the municipal council to enable it to appoint the candidates that meet the competency standards. Furthermore, employment contracts and performance agreements must be submitted to the MEC responsible for local government in the relevant province as well as the national minister responsible for local government within fourteen (14) days after concluding the employment contract and performance agreement.\(^\text{18}\) This will enable the provincial or national department responsible for local government to reverse illegal appointments made by the council.

This intervention by national government is commendable given the fact that municipal managers bear the primary responsibility to ensure that municipal administration complies with the constitutional principles of professionalism enunciated in section 195 of the Constitution. The municipal manager is “a key structure of a municipality and not merely a personnel appointment as contemplated in s 160(1(d) of the Constitution”.\(^\text{19}\) The regulations require the MEC in the relevant province and the national minister responsible for local government to monitor compliance with employment contracts and performance agreements.\(^\text{20}\) This intervention holds the promise of infusing efficiency and effectiveness in local government and thus turning the tide of poor or non-existent service delivery. However, the crises at local government seems to be worsening, despite the fact that the regulations required that performance agreements be reviewed yearly and be replaced by new agreements. There is no evidence of the implementation of this competency framework and the mechanisms to enforce compliance therewith. Evidently, the municipal councils, MECs and the national minister responsible for local government are not doing a good job in enforcing compliance with the competency framework and in monitoring and evaluating the performance agreements. Despite such blatant failures no one has been held accountable for non-compliance with the competency framework. It would seem that the enforcement mechanisms under the DPLG’s regulations are not strict enough. In this light, it is over ambitious to expect the competency framework to enforce themselves.

\(^{16}\) Regulation 2 of the Performance Regulations.
\(^{17}\) Regulation 4(4)(b) of the Performance Regulations.
\(^{18}\) Regulation 5 of the Performance Regulations.
\(^{19}\) Executive Council of the Western Cape v Minister of Provincial Affairs and Constitutional Development; Executive Council of KwaZulu-Natal v President of the Republic of South Africa and Others 1999 (12)BCLR 1360 (CC) para 109.
\(^{20}\) Regulation 4(5) Performance Regulations.
3.2 Intervention of the National Treasury

The National Treasury also saw a legislative intervention befitting for the problems besetting local government. In this regard, it introduced parallel regulations providing for minimum competency levels for financial and supply chain management officials. The focus of these regulations, unlike the DPLG’s regulations which focussed on outcomes, is on the competence of senior administration. The National Treasury has also issued guidelines to give flesh to the competency framework for financial and supply chain management officials in senior and middle management levels contained in the regulations. It would seem that the National Treasury felt that the DPLG’s regulations do not go far enough, thus it included competency framework for financial and supply chain management official in both senior and middle management levels in its regulations. The DPLG’s regulations only provide for the competency framework and performance management of municipal managers and managers directly accountable to the municipal managers.

The Treasury regulations require the accounting officer to have a bachelors degree and a higher diploma in a relevant field or a certificate in Municipal Financial Management. These regulations require the same qualification for the senior managers and Chief financial officers in low capacity municipalities. For high capacity municipalities, however, the regulations provide that senior managers and chief financial officers must hold an Honours degree in a relevant field or, in the case of the chief financial officer, must be a chartered accountant in South Africa. Similarly, the Treasury regulations go a step further than the DPLG’s regulations in that for the municipal manager, here the accounting officer, the senior managers and the chief financial officers in low capacity municipalities the relevant qualification require is not only a recognised bachelors degree in a relevant field but also a higher diploma in a relevant field. If none of these are present then a certificate in Municipal Financial Management. Unlike the DPLG’s regulations which do not make a distinction between high and low capacity municipality, the Treasury regulations insist on such differentiation. In this regard, senior managers and chief financial officers in high capacity municipalities must have more than just a bachelors degree as demanded by the DPLG’s regulations; they must also have an honours degree in a relevant field. The alternative for the chief financial officers is that they must be chartered accountants in South Africa.

---

22 These are municipalities whose annual budget is below 500 million in value.
23 The municipalities whose annual budget is of a value equal to or in excess of 500 million.
The Treasury regulations also take the experiential requirements a step further. They require of the accounting officers five years of experience at senior management level. On the contrary, any five years experience is sufficient for the municipal managers under the DPLG’s regulations. For senior managers and chief financial officers, the Treasury regulations require seven years experience at senior and middle management level, in the case of high capacity municipalities, and five years at middle management level in the case of low capacity municipalities. Five years experience at any management level will do for senior managers under the DPLG’s regulations. The Treasury regulations further require all financial and supply chain management officials to have competencies and proficiencies in 21 specific unit standards relating to strategic leadership and management; strategic financial management; operational financial management; governance, ethics and values in financial management, to mention but a few. The DPLG’s regulations, in turn, simply require core managerial and occupational competencies.

The Treasury regulations suspended the immediate application of the competency framework to allow for the concerned officials to acquire the prescribed minimum competency levels. In this regard, the countdown has begun towards the 31st of December 2012 for all financial and supply chain management officials to obtain the relevant competencies to improve service delivery. The DPLG’s regulations have also allowed for a period of grace for the senior management to acquire the relevant competencies. However, no strict deadline is provided for in the DPLG’s regulations.

4 Enforcement of the Treasury regulations

4.1 The legality of contracts

It is one thing to count down to the effective date of the competency framework, it quite another to be confronted with a sizeable number of municipalities not in compliance with the competency framework on the said date. What would the implications be for the existing contracts of the officials who failed to meet the competency framework? The Treasury regulations are not explicit as to what would happen to the employment contracts of the defaulting officials. They simply state that the attainment of the competency levels within the timeframe set out therein must be included as a performance target in an official’s performance agreement. They further state that a municipality may, before 1 January 2013, employ any person who does not meet the competency levels prescribe for the relevant position, provided that the continued employment of such officials is subject to the attainment of competency framework on or before 1 January 2013. Does this mean therefore that the defaulting officials will be out of their jobs from midnight on the 31st of December 2012

25 Regulation 3 of the Competency Regulations.
26 Regulation 16(2) of the Competency Regulations.
27 Regulation 18(2) of the Competency Regulations.
onwards? Would the contracts become invalid or lapse automatically or by operation of the law? It would seem that there are two possibilities. One possibility is that the employment contract would become invalid by operation of the law and the provincial government would then have to approach the court for a declaration of invalidity. The second possibility is that the officials concerned would be in breach of the conditions of employment in that an inherent requirement of the job was not met. This therefore invokes the principles of labour law which are beyond the scope of this paper.

4.2 Enforcement procedure by provinces or the National Treasury

4.2.1 Provincial supervision
The Constitution requires provincial governments to play an important role of supervising local government in the performance of its functions. In fact, the South African democracy is a system of carefully worked out checks and balances, which exist to ensure that municipalities indeed become service delivery agents and that provincial governments play a supervisory role in this regard.\(^{28}\) The Constitution fortifies this position by referring to various obligations that are aimed at determining the relations between a province and a municipality. These obligations relate to regulation, monitoring, support of, and intervention by provinces in, municipalities. Regulation, as a form of supervision, sets the necessary framework within which the local government functions can responsibly be exercised.\(^{29}\) Monitoring is a form of supervision which ensures that not only legislative framework is complied with, but which also indicates when support is required to enable local government to exercise its responsibilities fully.\(^{30}\) The obligation to support, in turn, relates to the strengthening of existing local government structures, powers and functions and the prevention of a decline or degeneration of such structures, powers and functions.\(^{31}\) As to intervention, it refers to the competence (and often a duty) of the national and provincial government to direct activities and outcomes in the municipality.\(^{32}\) The National Treasury has fulfilled its first obligation relating to regulation by issuing the regulations in question.

(a) Duty to monitor
The provincial treasuries and the provincial departments responsible for local government must first monitor local government capacity and assess the support needed to strengthen their capacity, before the effective date of the competency framework.\(^{33}\) The Systems Act contains various instruments of monitoring which include: firstly, self-reporting through the preparation of annual report after each financial year, secondly, request for information by the

---

32 First Certification judgment.
33 S 105(1) Systems Act.
MEC and finally, appointment of a commission of investigation if there is reason to believe that a municipality cannot or does not fulfil a statutory obligation... The provinces should detect difficulties with compliance with the competency framework and offer the necessary support way before the effective date of the competency framework.

(b) Duty to support
The Constitution enjoins the provincial government to provide for the support of municipalities in the province. Accordingly, after having identified the difficulties faced by municipalities in attaining the requisite competencies through monitoring, the provincial treasuries should enforce compliance with the competency framework by providing the necessary assistance to municipalities who are struggling to attain those competencies.

(c) Duty to intervene
Only if the other two enforcement mechanisms do not bear any results would the provincial treasuries intervene in the defaulting municipalities. The basis for such intervention would be a failure by the relevant municipalities to fulfil an executive obligation in terms of legislation. In this regard, the Treasury regulations enjoin the municipalities to assist officials who do not meet the competency levels on the date of issue of these regulations, to attain them before 1 January 2010. This, therefore, means that any signs of tardiness, detected through monitoring, on the part of municipalities to offer the necessary assistance to its officials constitute a failure to fulfil an executive obligation. In any event, the mere fact that the provincial government has offered support to municipalities means that the obligation to support by municipalities is not fulfilled. If therefore the municipalities fail to fulfil their obligation to support its officials even after receiving the necessary support from the provinces, then the duty by provincial government to intervene kicks in.

Section 139(1) of the Constitution provides that when there is a failure to fulfil an executive obligation the provincial government must intervene by taking any appropriate steps to ensure the fulfilment of the executive obligation(s). These appropriate steps include the issuing of a directive, assumption of responsibility and dissolution of the council. The provincial government would firstly issue a directive to the defaulting municipalities directing them to take steps to ensure compliance with the competence framework. If the municipality fails to take the necessary steps suggested in the directive, then the provinces must take the second step in the intervention process, i.e. they must assume the responsibility of ensuring compliance with the competency framework. This would mean that instead of offering support to municipalities, the provincial treasuries would actually take the responsibility of ensuring compliance with the competency requirements before 1 January 2013. This responsibility

34 S 105(2) Systems Act.
35 S 106 Systems Act.
36 S 155(6) Constitution.
37 S 139(1) Constitution.
would entail training the existing officials to meet the competency levels demanded by the competency framework. If assumption of responsibility does not bear tangible outcomes, then the last step in the intervention process is the dissolution of the municipal council. Dissolution of the municipal council is the measure of last resort only if exceptional circumstances exist, e.g. when the council does not want to co-operate with the provincial government which has assumed responsibility to ensure compliance with the competency framework.

Any form of sanction to be meted against defaulting municipalities on the effective date of the competency framework should take account of whether the relevant provincial departments have played their constitutional role of ensuring that municipalities meet the competency framework. It would be unfair to leave municipalities to their own devices in this regard until the end knowing full well that the communities are exerting an increasing pressure for service delivery and that there are other targets that, if not met, would lead to intervention, like the adoption of a budget, for example. Municipalities have many reporting and compliance obligations and they would therefore be loath sending away key official to complete a course using their resources and time and risk the possibility of not meeting their other targets.

The National Treasury should therefore put in place support mechanisms to facilitate compliance with the competency framework. As things stand, there are no such mechanisms put in place by the National Treasury and this should be taken account of when considering imposing sanction on the defaulting municipalities for non-compliance with the competency framework. Otherwise, the competency framework can easily be deemed as another attempt to strangulate local government.

5 Municipal Systems Amendment Bill
The most recent intervention into the state of municipalities in the country was made by the Department of Cooperative Government and Traditional Affairs through the introduction of an Amendment Bill before Parliament. The Amendment Bill is in direct response to the crisis at local government and seeks to amend the Systems Act to provide for the competency framework for the appointment of municipal managers and managers directly accountable to them. In terms of the Amendment Bill, to be appointed as a municipal manager or a manager directly accountable to the municipal manager, a person must have specific qualification and experience which will be set out in regulations or guidelines. The Amendment Bill provides that any appointment in contravention of the competency framework will be null and void. If a person is appointed in contravention of the competency framework to be contained in the regulations, the MEC must enforce compliance by the municipalities with the competency framework by applying to court for the declaratory order on the validity of the appointment or

39 S 54A Municipal Systems Amendment Bill.
40 S 54A(8) Municipal Systems Amendment Bill.
by taking any other legal action against the municipality. If the MEC fails to enforce compliance with the competency framework, the minister responsible for local government may step in. Furthermore, councillors may be held personally liable for any fruitless and wasteful expenditure which any of their illegal decisions may cause. It would seem that COGTA seeks to introduce even tighter sanctions for non-compliance with the competency framework.

It should be noted that the competency framework contained in all these instruments bears a lot of similarities. Although the DPLG’s regulations focus on performance, they contain almost the same competency framework with the Treasury regulations whose focus is on competence. The regulations to be issued pursuant to the Amendment Bill also promise to focus on the competency levels. Given that all these regulations serve the same client and were meant to address the same mischief, they should be seen as complimenting each other. It would be nightmarish to expect municipalities to comply with the letter of each of these parallel regulations separately. This would amount to duplication which would strangulate local government further. The separate enforcement of parallel competency frameworks by various government departments might do more harm than good in addressing the problems confronting local government. They hold a great potential for conflict and confusing. In this light, it would seem therefore that these regulations need to be aligned to ensure uniformity and avoid duplication. The enforcement mechanisms must be coordinated and aligned at the provincial cabinet levels. Furthermore, the enforcement mechanisms contained in the Amendment Bill are stricter and therefore should attract application across the board, i.e, to the treasury and performance regulations as well.

How would the enforcement of the MFMA by the MEC for local government work in practise without being politically problematic? There seems to be a competition between the national treasury and the national department responsible for local government. They do not seem to share the same vision for local government or if they do at all, each department wants to claim victory for turning the tide of capacity deficit at local government. Local government should not be the price in the turf battle between these two departments. Accordingly, after the alignment of all these regulations, there should be an agreement at the provincial cabinet level that the department responsible for local government should enforce compliance with the competency framework, whether it is in terms of the MFMA, regulations issues in terms thereof or any other legislation. The provincial treasuries would then assist in monitoring areas to do with financial obligations and offering the necessary support. Otherwise, the idea of professionalising local government, although, novel and commendable, might be frustrated by the parallel attempts by national governments to turn local government around.
6 Conclusion
The intervention by government, through its departments, shows the political will to address the capacity and skills deficit bemoaned at local government level and is therefore commendable and, indeed, welcome. It holds the promise to enhance the constitutional vision of local government by injecting professional work ethics, accountability for own actions and efficiency in service delivery. The introduction of the competency framework has the potential to ensure that lethargy and unprofessionalism in municipal administration give way to the new ethos of efficiency. The experience gained through the number of years at senior management level would, for instance, ensure that the municipal officials hit the ground running in discharging their obligations and thus ensure efficient service delivery. The kind of competence required of municipal officials signifies the importance of being at the coalface of service delivery. The local sphere of government is the most important sphere in that it deals with the hopes, dreams and aspirations of the communities. The frustration of those dreams can have dire consequences for the proper functioning of the municipality in question, as has been witnessed through service delivery confrontations. In the result, employing competent personnel with the right mindset, skills and level of commitment will ensure sustainable and consistent smooth functioning municipality. This, in turn, constitutes compliance with the principles of professionalism.
Bibliography

Legal instruments

Policy Documents


Guideline for Municipal Competency Levels: Accounting Officers: Municipal Regulations on Minimum Competency Levels.


Guidelines for Municipal Competency Levels: Senior Managers Municipal Regulations on Minimum Competency Levels.

Books


Chapters in Books

Case Law
Beck and Others v Kopanong Local Municipality and Others Case no 3772/2002 unreported (Orange Free State).

Executive Council of the Western Cape v Minister of Provincial Affairs and Constitutional Development; Executive Council of KwaZulu-Natal v President of the Republic of South Africa and Others 1999 (12)BCLR 1360 (CC).


Mnquma Local Municipality and Another v Premier of the Eastern Cape and Others


**Articles**


**Papers**

Smith, G. "The role of a province in the new local government dispensation: a Western Cape case study" (2002), LLM thesis (UWC).