Intragovernmental governance in South Africa
An analysis of recent jurisprudence

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Abstract

In the South African local government domain, municipalities' ability to execute legislative and executive powers is vested in municipal councils (section 151(2) of the Constitution of the Republic of South Africa, 1996). Given the importance of a municipal council from a functionality perspective, any suspension of executive or legislative decision-making powers can impede the realization of municipal councils' constitutional purpose, specifically, the objective to provide democratic and accountable governance to local communities. In recent years, local coalition governments have been seen more frequently, partly due to the number of hang councils in South Africa. Governance suffers because of the resulting volatility caused by political standoffs. The departing premise hereto is that the realization of a democratic and accountable government depends on the degree of functionality of every municipal council. Conversely, in councils, volatility can adversely compromise democratic and accountable governance. During recent years, coalition governments in local government have been seen more frequently, partly due to the number of hung councils in South Africa. This article builds on the legal insight provided in the case of the Premier, Gauteng and Others v Democratic Alliance and Others; All Tshwane Councillors who are Members of the Economic Freedom Fighters and Another v Democratic Alliance and Others; African National Congress v Democratic Alliance and Others [2021] ZACC 34. The authors considered using governance mechanisms to provide better support and guidance to ensure the continuation of democratic and accountable government practices, where fractured coalitions have caused governance fallouts in municipal councils.

Keywords: council; dysfunctionality; intergovernmental; intervention; local governments

Introduction

Post facto, in the 2021 municipal elections, about 70 councils of the 278 South African municipalities were declared hung councils (Netswera and Khumalo, 2022). Hung councils are best described when no political party obtains an outright majority of votes cast, and different parties need to consolidate their minority support, gained

during local government elections, to form a minority government or coalition government (De Vos, 2021). Hereto, where a ruling party does not have an outright majority, it can only be successfully governed with the support of other coalition partners (*Premier, Gauteng and Others v Democratic Alliance and Others, African National Congress v Democratic Alliance and Others* (CCT 82/20; CCT 91/20) [2021] ZACC 34; 2021 (12) BCLR 1406 (CC); 2022 (1) SA 16 (CC) (4 October 2021); para 203). Beukes and de Visser explain that these coalition governments are often fragile and unstable based on their inability to collaborate and consequently fail to appropriately discharge the executive and legislative responsibilities of the related council (Beukes and De Visser, 2021). The failure of coalition partners to collaborate on councils' executive and legislative responsibilities frequently causes instability.

Council instability can inadvertently trigger related failures to perform constitutional duties like passing annual budgets, facilitating senior manager appointments, making policies, and passing essential by-laws (Beukes and De Visser, 2021). This, in return, ever so often, can be the most significant contributor to poor services rendered to communities (Beukes and De Visser, 2021). Likewise, based on the severity of service delivery collapses, unstable coalition partnerships can equally lead to mandatory section 139 interventions, which are then utilised to normalise the sustainable provision of services to communities; however, effective results hereto are only sometimes guaranteed. Likewise, these interventions from other spheres of government are often frowned upon by our courts, as other spheres of government sporadically usurp municipalities 'powers and are consequently considered constitutionally questionable based on the unwarranted intrusion that the intervention represents from a self-governing perspective.

Hereto, it is an established principle that in terms of the constitutional mandate of national government and provinces, these spheres should focus on monitoring and support services provided to municipalities. This article will, therefore, focus on statutory governance mechanisms that have the potential to prevent or counter the erosion of democratic and accountable governance caused by fractious minority coalitions without the unnecessary intrusion associated with section 139 of the Constitution. It follows that the collapse of municipalities typically precedes or coincides with governance failures. Hence, it is anticipated that governance mechanisms can prevent or restore the negative consequences of governance failures before the inevitable consequences of poor governance, like financial instability and service delivery failures, set in.

The Case of The Premier, Gauteng and Other V Democratic Alliance and Others

On 4 March 2020, the Gauteng Executive Council resolved to dissolve the Tshwane Metropolitan Council; this decision came about after the Tshwane Metropolitan

Council continuously failed to quorate since September 2018 due to fractious coalition relationships in the Metropolitan Council (Premier, Gauteng and Others v Democratic Alliance and Others, African National Congress v Democratic Alliance and Others (CCT 82/20; CCT 91/20) [2021] ZACC 34; 2021 (12) BCLR 1406 (CC); 2022 (1) SA 16 (CC) (4 October 2021); para 6). This failure was due to some councillors continuously walking out of these meetings, causing these meetings to no longer quorate. This, in return, caused the failure of the Tshwane Municipal Council not to take the necessary executive and legislative decisions and created disproportionate instability due to the vacuum subsequently created in governance.

In response to the extended inability of the Metropolitan Council to properly govern in terms of its constitutional mandate, the Gauteng Executive Council resolved to intervene in the Tshwane Metropolitan Council. Consequent to the Gauteng Executive Council's decision to dissolve the Municipal Council in terms of section 139 (c) of the Constitution, the Democratic Alliance, who was the ruling party in the Municipal Council, approached the Court urgently to set aside the decision of the Gauteng Executive Council. The Democratic Alliance argued that the dissolution decision was not a suitable remedy, and no exceptional circumstances warrant it, as implied in section 139(1)(c) of the Constitution.

The Democratic Alliance further argued that there were numerous "textual and contextual indicators" in section 139(1)(c), which required prior engagement or consultation by the Premier prior to the dissolution of the Municipal Council (Premier, Gauteng and Others v Democratic Alliance and Others, African National Congress v Democratic Alliance and Others (CCT 82/20; CCT 91/20) [2021] ZACC 34; 2021 (12) BCLR 1406 (CC); 2022 (1) SA 16 (CC) (4 October 2021) para 10). The Constitutional Court consequently delivered judgment hereto and upheld the decision of the High Court to overturn the decision of the Gauteng Provincial Executive to dissolve the Council of Tshwane in terms of section 139(1) (c) of the Constitution.

Necessary for purposes of this article, the Constitutional Court explained that even in the event of an intervention by the Provincial Executive to execute specific executive functions of the Municipality, the broader problems associated with the dysfunctionality of the Municipal Council would have remained, and hence section 139(1)(c) interventions cannot be used as a magic wand to miraculously remedy governance and service delivery failures in South Africa's Capital City. Hereto, the Court pronounced, "In real terms, the dysfunctionality meant that the Municipal Council was unable to fulfil all its obligations, regardless of whether they were executive or administrative." This statement stresses the need to explore the potential of other governance mechanisms that can be used as associated remedies to address dysfunctionality (governance and service delivery failures) linked to failed coalitions without the need for other spheres of government to intrude in the affairs of municipalities.

In the above matter, the High Court detailed nine critical observations in the Dissolution Notice (Premier, Gauteng and Others v Democratic Alliance and Others, African National Congress v Democratic Alliance and Others (CCT 82/20; CCT 91/20) [2021] ZACC 34; 2021 (12) BCLR 1406 (CC); 2022 (1) SA 16 (CC) (4 October 2021) para 23). Governance failures or issues related to service delivery obligations cited during the proceedings comprised of nine key observations, which included: "(a) a leadership crisis that has left the Council barely able to function; (b) due to this instability, the City is without a Mayor, Mayoral Committee or Municipal Manager; (c) there has been widespread corruption; (d) there is a water crisis in Hammanskraal; (e) the City "has not been fulfilling its obligations in respect of grant spending"; (f) there is a "grave concern" of returning grants allocated for service delivery due to poor performance; (g) the suspension of the heads of the departments of human settlement and roads and transport; (i) there is a "widely reported crisis at the Wonderboom National Airport that include[s] issues of corruption and maladministration"; and (j) irregular expenditure to the tune of R5 000 000 000." Although the Court primarily focused on these obligations to decide whether these obligations would constitute executive obligations and further if these were exceptional circumstances warranting the dissolution of the Municipal Council, this article utilises these examples to test whether these physical features of a dysfunctional municipality could have been remedied with the use of governance mechanisms.

These governance mechanisms will now be discussed under the following headings: intragovernmental governance mechanisms and constituency-based governance mechanisms.

Intragovernmental Governance Mechanisms

In accordance with section 195 of the Constitution, public administration must be accountable (Section 195(1)(f) of the Constitution of the Republic of South Africa, 1996). Hereto, intragovernmental accountability creates responsive obligations that functionaries must perform in the intra-municipal context (Karsten, 2022). Intragovernmental governance mechanisms in municipalities can also contribute towards the realisation of accountable governance and mitigate poor governance caused by coalition fallouts. These governance mechanisms are designed to internally self-correct potential or ongoing dysfunctional governance, which inadvertently can also remedy associated poor governance caused by coalition fiascos. From an intra-governmental perspective, accountability deficits follow hierarchal, regulatory, delegatory and professional compliance structural designs (Karsten, 2022). Similarly, governance mechanisms in the intra-governmental dimension can also be analysed from a "hierarchal, regulatory, delegatory and professional compliance perspective" (Karsten, 2022).

A perfect example of the internal governance aspect's delegatory milieu includes municipalities' delegations systems. A municipal council is responsible for decision-making in the municipality. The system of delegations is designed to maximise administrative and operational efficiency with minimal delays in service delivery in that a council delegates its decision-making powers to, inter alia, administrative functionaries like the accounting officer, the chief financial officer and other senior managers (National Treasury, 2013). It follows that this decision-making capability presented by the system of delegations can mitigate service delivery issues in dysfunctional coalition-led municipalities, with the delegatees able to execute necessary administration and service delivery functions without the functionality of the coalitions impeding the constitutional obligations of municipalities. De Visser & Chigwata explain that, except for constitutional obligations in terms of section 160(2) of the Constitution and specific statutory functions derived from the Municipal Finance Management Act 56 of 2003 (MFMA) that need to be executed by the council, all other decision-making powers of a council can be delegated (De Visser and Chigwata, 2023).

From a hierarchal perspective, the Municipal Manager is the head of the administration. As head of administration, the municipal manager is accountable for developing an accountable administration (Section 55(1)(a) of the Local Government: Municipal Systems Act 32 of 2000) who is inter alia responsible for the implementation of an integrated development plan (Section 55(1)(a)(i) of the Local Government: Municipal Systems Act 32 of 2000) and performance management systems of the Municipality, from an intragovernmental perspective (Section 55(1)(a)(ii) of the Local Government: Municipal Systems Act 32 of 2000). The Local Government: Municipal Systems Act 32 of 2000 regulates how integrated development planning and performance management are performed in municipalities (See Chapters 5 and 6 of the Local Government: Municipal Systems Act 32 of 2000 for a detailed description of integrated planning in municipalities.). Similarly, the Systems Act requires a municipality to establish a performance management system to measure its performance to allow the municipalities to "administer its affairs in an economical, effective, efficient and accountable manner" (See section 38 of the Local Government: Municipal Systems Act 32 of 2000. Also see SALGA Municipal Support and Intervention Framework, 2020).

Performance Management Systems

Sections 40 and 41 of the Local Government: Municipal Systems Act 32 of 2000 require municipalities to have mechanisms and core components to monitor and review their performance management system (see sections 40 and 41 of the Local Government: Municipal Systems Act 32 of 2000). These performance management systems have an overarching performance management framework (see Regulation 7 (1) of the Local Government: Municipal Planning and Performance Management Regulations 2001, which states that "A Municipality's Performance Management System entails a framework that describes

and represents how the municipality's cycle and processes of performance planning, monitoring, measurement, review, reporting and improvement will be conducted, organised and managed, including determining the roles of the different role players") that represents a holistic perspective of performance in the Municipality and can, for example, include performance-related data in terms of the Municipality's integrated development plan (IDP), Service Delivery Budget Implementation Plan (SDBIP), Directorate/Departmental scorecards, individual/section 56 managers performance, evaluation in terms of governance, design of performance management indicators, performance process maps (top layer SDBIPs, departmental SDBIPs and individual performances). Therefore, performance management mechanisms facilitate strategy development, such as an early warning system and increased accountability (Saldanha Bay Performance Management Framework, 2022).

Likewise, the results of these performance measurements must also be submitted for auditing, both to the Municipality's internal auditing department and externally to the Auditor General (section 45 of the Local Government: Municipal Systems Act 32 of 2000). Performance management frameworks can serve as early warning systems to monitor and remedy underperformance regarding actual service delivery in municipalities (section 41(2) of the Local Government: Municipal Systems Act 32 of 2000, whereby a performance management system applied by a municipality must be designed and devised in such a way as to serve as an early warning indicator of under-performance). These performance frameworks are integrated or synchronised with both the integrated development plans (Chapter 5, Integrated Development Planning of the Local Government Municipal Systems Act of 32 of 2000) and SDBIPS (National Treasury Circular 13 Service Delivery and Budget Implementation Plan (SDBIP), 2005. Also, see National Treasury Circular 88 Municipal Circular on the Rationalisation Planning and Reporting Requirements for the 2018/19 MTREF to understand how SDBIPS interphases with the IDP). In municipalities, underperformance or regressive performance can be tracked over successive periods. Hence, identified poor service delivery failures cannot be cloaked to escape scrutiny from a municipality's executive or administrative powers (Municipalities must be developmentally orientated to give effect to their developmental duties as required by section 153 of the Constitution of the Republic of South Africa, 1996. Therefore, they need to both plan and monitor developmental objectives in municipalities. IDPs and SDBIPs are also performance management mechanisms and can be used to plan and monitor performance in municipalities. For this article, these governance mechanisms will not be discussed in detail. However, it is essential to note that these mechanisms are also fundamental intragovernmental mechanisms that can be used to measure the actual performance of municipalities to mitigate internal dysfunctionality in municipalities). For example, based on the conditional nature of Municipal Infrastructure Grant funding, the slow progression of Municipal Infrastructure Projects can be successfully tracked by performance management mechanisms to prevent

the withdrawal of funding due to municipalities' nonperformance (The Municipal Infrastructure Grant Programme: An Introductory Guide March 2004. Also see MFMA 2020-21 Consolidated General Report on Local Government Audit Outcomes 64, where the National Treasury withheld conditional grant funding of R429,02 million in the Mangaung Metropolitan Municipality due to under-expenditure due to delays in completing grant-funded projects). The above instance can be seen in the recent events in the City of Johannesburg, the Ekurhuleni Metropolitan Council and the City of Tshwane (Njilo, 2024).

Municipal Audit Committees, Internal Audit Function, Annual Reports and Related Registries

Municipal governance practices are contingent on functional internal audit units, proper internal control systems, and institutionalised audit committees (National Treasury, 2012). Internal auditors and audit committees are regulated in terms of the Municipal Finance Management Act 56 of 2003 (hence MFMA) (section 165 of the MFMA requires that each Municipality and each municipal entity have an internal audit unit that must advise the accounting officer and the audit committee of the Municipality in terms of implementing the audit framework. Also, see section 166 of the MFMA, which requires that each municipality has an audit committee. In terms of the MFMA, these audit committees must advise the council, political office bearers, the accounting officer, and the municipal staff members on financial control, risk management, accounting practices, and other related good financial practices) and is a critical internal mechanism to advance accountability and governance over the activities of municipalities (National Treasury, 2012). Municipal executive and administrative actors can use these auditing mechanisms to regulate accountability and ethical behaviour. The bulk of audit findings can be addressed through recommendations made by internal audit and oversight by the audit committee (National Treasury, 2012), which, in return, can ensure that these findings do not become habitual and cause material or adverse findings that inevitably record poor governance practices and more severe financial misconduct in municipalities.

Part of the oversight done by the Audit Committee will include scrutiny of the municipal audit file by the related standards and national treasury guidelines (National Treasury, 2012) and the review of the municipality's annual financial statements two weeks before the Auditor General's auditing thereof (National Treasury, 2012). The audit committee is safeguarded from undue influence through its independence from the Municipality. It can justly execute its duties in good faith and with integrity (Audit Committee members are often also regulated in terms of their profession. Hence, the combination of professional and public administration accountability creates a higher threshold of integrity and responsiveness to ethical

behaviour. For a more detailed discussion on professional accountability, see Karsten, 2022). Auxiliary instruments that enhance the work done in the above instance include the internal audit framework, audit action plan and different audit charters (of both the internal audit unit and audit committee) to enhance the accountability enforced by the auditing mechanisms in the municipalities.

Annual reports are also a valuable intragovernmental governance mechanism to compare performance during a specific financial year about targets and actual performance in the previous financial years (section 46(1)(a) of the Local Government: Municipal Systems Act 32 of 2000). Features included in annual reports include development and service delivery priorities and performance targets (section 46(1)(a)(ii) of the Local Government: Municipal Systems Act 32 of 2000) that the council must monitor and develop measures to be taken to improve performance (section 46(1)(a)(iii) of the Local Government: Municipal Systems Act 32 of 2000).

Also, the financial statements of the Municipality (section 46(1)(b) of the Local Government: Municipal Systems Act 32 of 2000) and the audit report on the annual financial statements must be included to cause council (section 46(1)(c) of the Local Government: Municipal Systems Act 32 of 2000), as the executive and legislative actors in the local government sphere, they oversee the actual state of the municipality and devise solutions to remedy any dysfunctionality and material aspects that could impede the efficiency of services being delivered. Therefore, like events cited in the Premier, Gauteng and Others v Democratic Alliance and Others case, material issues mentioned would have been reported in the annual report as a governance mechanism. Hence, the early warning and monitoring mechanism must be used to identify and devise strategies to remedy the deficiencies associated with the service delivery dysfunctionality associated with the coalition government (Premier, Gauteng and Others v Democratic Alliance and Others, African National Congress v Democratic Alliance and Others, (CCT 82/20; CCT 91/20) [2021] ZACC 34; 2021 (12) BCLR 1406 (CC); 2022 (1) SA 16 (CC) (4 October 2021); para 13).

For example, issues like the failure to adequately address water and electricity losses (Consolidated Annual Report for the City of Tshwane For the period: July 2016-June 2017), inadequate revenue collection and debtor management (Consolidated Annual Report for the City of Tshwane For the period: July 2016-June 2017), Fruitless and Wasteful Expenditure Framework (UIFW) (Consolidated Annual Report for the City of Tshwane For the period: July 2016-June 2017), weak contract management (Consolidated Annual Report for the City of Tshwane For the period: July 2016-June 2017), recurring audit and implementation of the audit plans (Consolidated Annual Report for the City of Tshwane For the period: July 2016-June 2017), and failure to fill senior management positions (Consolidated Annual Report for the City of Tshwane For the period: July 2016-June 2017), had been reported in the Consolidated Annual Report for the City of Tshwane for the period of July 2016- June 2017 and

had become repetitive at the time the matter was before the Court and could have been solved had proper oversight been done on the non-attainment of these issues reported in the annual report governance mechanism.

Intragovernmental governance mechanisms to address weaknesses in governance and accountability by dysfunctional coalitions use skills audits in the administration to develop its human resource capacity to execute its functions and exercise its powers properly. Skills audits conducted in municipalities can contribute to municipalities executing their functions in "an economical, effective, efficient and accountable way" (section 68(1) of the Local Government: Municipal Systems Act 32 of 2000).

Financial intragovernmental governance mechanisms

The financial health, inter alia revenue and expenditure management problems in municipalities adversely affect service delivery in most municipalities in South Africa (Consolidated General Report On Local Government Audit Outcomes MFMA 2021-2022). During the 2021/2022 financial year, the Auditor General reported that unfunded budgets and increased unauthorised expenditures highlight municipalities' weaknesses in financial planning. Section 217(1) of the Constitution, inter alia, stipulates that when a local sphere of government contracts for goods or services, it must do so in a fair, equitable, transparent, competitive, and cost-effective manner (section 217(1) of the Constitution of the Republic of South Africa, 1996). It follows that improved supply chain processes will cause increased financial vigilance in municipalities.

The MFMA Circular on supply chain practices explains that municipalities must enhance compliance, improve accountability, and combat fraud to promote transparency in local government supply chain management practices (National Treasury, 2012). Municipalities must prevent (section 32(4)(c)(ii) of the Local Government: Municipal Financial Management Act 56 of 2003), investigate (see Chapter 15, Financial Misconduct of the Local Government: Municipal Financial Management Act 56 of 2003. Also see National Treasury, 2012), recover section 32 expenditure (section 32(4)(c)(i) of the Local Government: Municipal Financial Management Act 56 of 2003), implement consequence management (National Treasury, 2012) and where applicable, institute criminal proceedings in terms of UIFW expenditure. Hereto, central registry mechanisms increase compliance and accountability in supply chain management practices and comprise financial registries like irregular expenditure registers and Registers of Unauthorised, Irregular, Fruitless and Wasteful Expenditure (National Treasury, 2013). These registries can assist in recording, tracking and managing Section 32 and other related expenditures (National Treasury, 2013). The registry can, therefore, serve as a central source of information for the council and other internal actors with the actual

recording of transaction details, the type of expenditure, the person answerable for the expenditure and measures taken regarding the UIFW expenditure (National Treasury, 2013).

Parallel to preventing section 32 expenditure, credit control mechanisms as internal governance mechanisms are equally essential to mitigate poor financial planning and management in municipalities. Credit control mechanisms can potentially increase revenue for the municipality and create a reciprocal relationship between the municipality and constituents, resulting in better service delivery (section 95(a) of the Local Government: Municipal Systems Act 32 of 2000). Municipalities must adopt, maintain and implement debt and credit control policies (section 96(b) of the Local Government: Municipal Systems Act 32 of 2000) and make provision for credit control mechanisms and debt collection mechanisms (section 91(a) and (b) of the Local Government: Municipal Systems Act 32 of 2000). These intragovernmental governance mechanisms are underestimated in their importance for governmental stability in struggling municipalities, whereby revenue streams are neglected and not maintained and inadvertently contribute to governance problems for the executive branch in municipalities. Aside from poor coalition governments in municipalities, revenue administration can be managed appropriately to mitigate the consequences of dysfunctional coalitions in cash-strapped municipalities.

Statutory boards and committees as internal governance mechanisms

Despite some internal governance mechanisms designed to serve as early warning mechanisms to intercept governance dysfunctionality in municipalities, statutory boards and committees in municipalities can also serve to investigate the liability of individuals involved, among other things, in financial misconduct, including disciplinary processes, suspensions, criminal charges, and the recovery of UIFW. In the above instance, the Municipal Public Accounts Committee (MPAC) and the Disciplinary Board, although perceived by municipalities to have the same functions, are very distinct in terms of establishment, composition, and functions (National Treasury, 2023). The powers and functions of MPACs are confirmed in section 79A in the Municipal Structures Amendment Act 3 of 2021, which confirms MPAC's role as a committee of council and the related duties that include the review of Attorney General (AG) reports, comments of the management committee, comments of the audit committee and the making of recommendations to the municipal council (Section 79A(3)(a) of the Local Government: Municipal Structures Amendment Act 3 of 2021).

Other essential features of MPAC include the review of internal audit reports, comments from the management committee and comments of the audit committee, and making recommendations to the municipal council (Section 79A(3)(b) of the Local Government: Municipal Structures Amendment Act 3 of 2021). Second, the initiation and development of its oversight report as contemplated in terms of section 129 of the MFMA (Section 79A(3)(c) of the Local Government: Municipal Structures Amendment Act 3 of 2021) and it also considers

and makes recommendations to the municipal council on any matter referred to MPAC by its institutional actors like the municipal council, executive committee, a committee of the council, a member of this committee, a councillor and the municipal manager (Section 79A(3)(d) of the Local Government: Municipal Structures Amendment Act 3 of 2021). Lastly, on its initiative, subject to the direction of the municipal council, MPAC can investigate and report to the municipal council on any matter affecting the Municipality (Section 79A(3)(e) of the Local Government: Municipal Structures Amendment Act 3 of 2021).

Dissimilar to the Disciplinary Board, which is made up of independent external professionals, MPAC is made up of councillors and executive role-players like the mayor, speaker and senior politicians (section 79A (2) of the Local Government: Municipal Structures Amendment Act 3 of 2021, whereby "the mayor or executive mayor, deputy mayor or executive deputy mayor, any member of the executive committee, any member of the mayoral committee, speaker, whip and municipal officials are not allowed to be members of the municipal public accounts committee") are barred from membership thereof, the mechanism is not immune to instability, and hence, uncertainty prevails regarding the actual effectiveness of this mechanism in the context of this article. The authors share the sentiments of De Visser and Chigwata: "Sadly, politics in many municipalities is no longer only about service delivery and the development of local communities. It is about political parties and councillors (re) gaining control of councils. The challenge is acute in municipalities where no single party has a majority to govern, therefore necessitating the formation of a coalition government. It is common knowledge that many coalition governments have been unstable" (De Visser and Chigwata, 2023). Hence, any politically represented committee or forum in a dysfunctional municipality is bound to be politically paralysed, irrespective of its purported oversight role. Regrettably, where political or other interests prevail and chaos prospers, there are no incentives to make things work (De Visser and Chigwata, 2023).

Therefore, with the exact above statement in mind, no other statutory political functionary in municipalities, like the mayor, speaker, chief whip of the council, mayoral committees or other section 79 or 80 committees, can be considered as internal governance mechanisms or actors effecting transformation in dysfunctional municipalities for purposes of this article and will therefore not be discussed in the same context. Although proposed amendments to the Local Government: Municipal Structures Act could see some enhanced accountability associated with the political functionaries, especially regarding the governance systems politicians use to execute their executive responsibilities. The Local Government: Municipal Structures Act, 1998: Local Government: Municipal Structures Amendment Bill, 2024 includes the provision that a municipality with a mayoral executive system in which no political party holds a majority must be replaced with a collective executive system (Local Government: Municipal Structures Act 117 of 1998. Also see Local Government: Municipal Structures Amendment Bill, 2024).

Hereto, motivation and assurance are provided in the Memorandum of the Local Government: Municipal Structures Amendment Bill, 2024 that even in the event of the mayor vacating office in an executive committee system, the rest of the executive committee remains functional and carries on executing their executive responsibilities. The reason behind this is that the executive committee is elected by the council (section 45 of the Local Government: Municipal Structures Act 117 of 1998) and not appointed by the Executive Mayor, like in the case of mayoral committee members in terms of the executive mayor system (section 60(1) of the Local Government: Municipal Structures Act 117 of 1998).

This further means that even in the event of hung councils, the mandatory use of the executive committee system makes for a more stable governance system for hung councils and ensures continuity in executive work that needs to be performed by both the executive committee and the council (Local Government: Municipal Structures Act 117 of 1998. Also see Local Government: Municipal Structures Amendment Bill, 2024). It can be expected that even accountability will improve where coalition governments are restricted to the executive committee system. Karsten explains that regarding the executive committee system, accountability applies to the entire committee and is not only primarily centred on the Executive Mayor in the context of the executive mayoral system (Karsten, 2022).

Although the mayor is also the chairperson of the executive committee, the responsibility to provide reports to the council on its decisions remains the responsibility of the executive committee and therefore, the entire executive committee remains accountable for all decisions the committee takes (Karsten, 2022). Notably, the composition of the executive committee, being representative parties and interests represented in the council, also stands to enhance the functionality of the council and improve aspects of service delivery as these aspects in terms of a functional executive committee system stand to be better isolated from fractious coalition relationships in municipalities. Therefore, aside from the executive committee system's potential, ensuring more stability from a governance perspective in municipalities could further contribute towards better accountability of fractious coalitions in municipalities.

An agreement can further help coalition parties regulate conduct if functions associated with office responsibilities are not performed honestly and transparently in good faith. Efforts to formalise coalition agreements can be seen in the recently published Local Government: Municipal Structures Act, 1998: Local Government: Municipal Structures Amendment Bill, 2024. The objective of the Amendment Bill is to define better what a coalition agreement is and also provide for binding coalition agreements. It is further suggested in the Bill that the high number of hung councils has emphasised the need to strengthen and provide guidance on the way that the formation and management of coalition councils are done (Local Government: Municipal Structures Act 117 of 1998. Also see Local Government: Municipal Structures Amendment Bill, 2024).

Except for councillors' accountability from a collective perspective, as discussed above, mechanisms to regulate councillors' individual accountability are also important. In the context of councillors' individual conduct, another mechanism includes the Code of Conduct for Councillors (section 36 of Local Government: Municipal Structures Amendment Act 3 of 2021). Although the council must consider any recommendations of misconduct against their compeers, the Code does make alternative provision, where the Member of the Executive Council local government may also appoint a person or a committee to investigate any alleged breach and to make a recommendation on whether the councillor should be suspended or removed from office (Schedule 1 to the Local Government: Municipal Systems Act 32 of 2000). Uncertainty prevails over the enforcement of the Code. Questions can be raised on whether the Code can be considered a feasible choice of governance mechanism for dysfunctional municipalities, as only the council can decide in this regard (Premier, Gauteng and Others v Democratic Alliance and Others, African National Congress v Democratic Alliance and Others (CCT 82/20; CCT 91/20) [2021] ZACC 34; 2021 (12) BCLR 1406 (CC); 2022 (1) SA 16 (CC) (4 October 2021); para 233).

On the other hand, in the authors' opinion, Disciplinary Boards are a more worthy governance mechanism to investigate and pronounce financial misconduct in dysfunctional municipalities. The board's composition comprises municipal staff members and external professionals, and councillors are excluded for purposes of the disciplinary board (National Treasury, 2023). Consequently, the board's main objective is to support the accounting officer in instituting disciplinary proceedings against officials who commit financial wrongdoings, as in Chapter 15 of the MFMA (National Treasury, 2023. Also see section 62(1)(e) of the Local Government: Municipal Finance Management Act 56 of 2003).

Hereto, the disciplinary board must investigate both financial misconduct (sections 171 and 172 of the Local Government: Municipal Finance Management Act 56 of 2003) and financial offences in terms of the Municipal Regulations On Financial Misconduct Procedures And Criminal Proceedings (Chapter 3 of the Local Government: Municipal Finance Management Act 56 of 2003). The oversight capability of the disciplinary board is further enhanced with simultaneous reporting of any allegations that may constitute an offence to the South African Police Service for criminal investigation (Chapter 3 of the Local Government: Municipal Finance Management Act 56 of 2003. Also see National Treasury, 2023). As mentioned previously, the importance of this governance mechanism is acknowledged in terms of its cross-disciplinary nature, which avoids any possible interference or inaction from a dysfunctional coalition government. The multi-disciplinary remedies in this instance can include possible internal disciplinary action against implicated employees (Regulation 6(3)(b) of the Local Government: Municipal Finance Management Act 56 of 2003), internal UIFW treatment to recover expenditure (Regulation 15(3) of the Local Government: Municipal Finance Management Act 56 of 2003) and criminal

proceedings should the financial transgression constitute a criminal offence (Chapter 3 of the Local Government: Municipal Finance Management Act 56 of 2003).

Finally, to maintain the optimum functionality of the disciplinary board and proper separation from the activities of other statutory boards and committees, the terms of reference of both the disciplinary board and MPAC must drafted to such an extent that they make specific reference to their related duties. In this regard, the National Treasury recommends that these respective terms of reference be amended to ensure all allegations of financial misconduct vest solely with the DC Board and parallel to it, MPAC powers be configured to investigate "consequence management" to cause it to monitor the implementation of consequence management associated with section 32 transactions earmarked for write-off or recovery (National Treasury, 2023).

The electorate holding municipalities accountable

"Building local democracy is a central role of local government, and municipalities should develop strategies and mechanisms (including, but not limited to, participative planning) to continuously engage with citizens, business and community groups" (section 3.3 of The White Paper on Local Government, 1998.) In dysfunctional municipalities ruled by contentious and unstable coalitions, this is the most critical and effective space where the electorate can be called upon to remedy accountability deficits caused by failed coalitions. Du Plessis describes this as municipalities being regulators responsible for monitoring and regulating their communities (Du Plessis, 2010). In terms of section 55(1)(a)(iii) of the Systems Act, the accounting officer is central hereto, whereby the municipal manager must ensure that the administration is responsive to the needs of the local community to participate in the affairs of the Municipality (section 55(1)(a)(iii) of the Local Government: Municipal Systems Act 32 of 2000).

Parallel to the administration's duty to be responsive to the local community's needs, the council must also use the municipality's resources in the local community's best interest (section 4(2)(a) of the Local Government: Municipal Systems Act 32 of 2000). When councillors are elected to represent local communities on municipal councils, this also includes ensuring that municipalities have structured accountability mechanisms for local communities (Schedule 1 of the Local Government: Municipal Systems Act 32 of 2000).

Conversely, municipalities must be more responsive to the communities' needs. In that case, the electorate has specific mechanisms to hold their local actors accountable for the services that must be rendered. Karsten describes the electorate as the "accountability dimension of final instance" (Karsten, 2022). The same can be applied in coalition fallouts where municipalities have fallen into dysfunctionality, in that when a municipality needs to account for itself, observing its internal governance mechanisms and other spheres' governance mechanisms have failed to remedy governance deficiencies. The electorate must intervene to hold (local) government accountable.

Elections are the most well-known mechanism to reset governing coalitions, symbolise the realisation of accountable governance, and actively mitigate poor governance caused by coalition fallouts. However, the 5-year cycles between elections often leave an extended vacuum of governance between elections if multiparty coalitions, which are responsible for the poor governance and dysfunctionality in municipalities, can only be unseated when replaced by the next coalition or at the next elections. In any case, this will lead to an excessive backlog of services when these coalitions are replaced, and based on the increasing levels of dysfunctionality, the electorate frequently seeks to intervene through other mechanisms at their disposal.

Likewise, legal remedies are unfortunately also frequently resorted to where internal accountability and accountability have failed (Karsten, 2022). Wright, Dube and du Plessis describe South Africa as fast becoming a lawfare state, where everything can be and are litigated in our courts of law (Wright *et al.,* 2022). This statement applies to both litigation and electorate-driven in the public domain. In electorate-driven litigation, communities often merely seek to hold the government accountable, which is a necessary constituent in a vibrant democracy regrettably, entities frequently use the Court to resolve disputes. Recently, our courts have also bemoaned the reliance on litigation to resolve disputes and clogged up the judicial system with these matters (Eskom Holdings SOC Limited v Emfuleni Local Municipality and Others [2023] ZAGPPHC 497; 94248/2019 (5 July 2023), para 1). Hereto, litigation is frequently utilised to settle these disputes or what can even be perceived as merely using legal proceedings to avert and delay probable unfavourable outcomes like the payment of debt (Eskom Holdings SOC Limited v Vaal River Development Association (Pty)Ltd and Others, [2022] ZACC, para 44), instead of optimally, a person uses intended legislated mechanisms like the Intergovernmental Relations Framework Act to resolve intergovernmental disputes (section 5 of the Intergovernmental Relations Act, 13 of 2005). Notwithstanding the importance of electorate-driven litigation in a democratic society, Karsten similarly explains that civil litigation has limited potential as an accountability mechanism in institutions' unresponsive or failed "political accountability" (Karsten, 2022).

The matter of Unemployed People's Movement v Eastern Cape Premier and Others 2020 (3) SA 562 (ECG) provides an example of the Court's willingness to intervene in the Municipality's executive authority exercised in the municipal domain. In this instance, the Makana Local Municipality failed to provide services to its community. The failure directly affected the lives of its residents, for which the Court ordered the Eastern Cape Provincial Government to intervene in terms of section 139 of the Constitution (Unemployed People's Movement v Eastern Cape Premier and Others 2020 (3) SA 562 (ECG), Part D of the Order).

In the Lekwa Local Municipality matter, the Municipality failed to provide utility services, such as water and electricity, to local businesses and residents for

years (Chonco, 2021). Hereto, in terms of the failure of the provincial government to ensure proper implementation of a financial recovery plan, the Court ultimately ordered in favour of Astral Operations Limited (Chonco, 2021). Importantly, in 2018, when Astral brought its initial application to the High Court, prior to the Court making the above order, the Court confirmed that a national intervention at that time was premature since the Province had already resolved to intervene in the Lekwa Local Municipality and accordingly needed to be provided time to implement the intervention (Chonco, 2021).

In Kgetlengrivier Concerned Citizens and Another v Kgetlengrivier Local Municipality and Others (UM 271/2020) [2020] ZANWHC 95), the Court declared that the Kgetlengrivier Local Municipality ("KLM") is in breach of its obligations to prevent contamination of the environment whilst allowing raw sewage to spill (Kgetlengrivier Concerned Citizens and Another v Kgetlengrivier Local Municipality and Others (UM 271/2020) [2020] ZANWHC 95, para 4). The Court ordered that if the spills were not resolved within a specified period, the Kgetlengrivier Concerned Citizens be authorised to take control of the sewerage works and allow the community organisation to appoint or employ suitably qualified people to operate the sewerage works (Kgetlengrivier Concerned Citizens and Another v Kgetlengrivier Local Municipality and Others (UM 271/2020) [2020] ZANWHC 95, para 17).

Other similar examples of the increasing nature of electorate litigation include the Save Emalahleni Action Group and Others v Emalahleni Local Municipality matter (National Treasury, 2022); the Let's Talk Komani v the Premier of the Eastern Cape and Others matter (National Treasury, 2022); the Mafube Business Forum and Another v Mafube Local Municipality and Others matter (1969/2021) [2022] ZAFSHC 86 (28 April 2022); and a High Court application by Harrismith Business Forum to interdict Eskom from discontinuing electricity supply to Maluti-A-Phofung Municipality (National Treasury, 2022).

In the matter of Eskom Holdings SOC Limited v Emfuleni Local Municipality and Others, which commenced in 2018, Eskom initially needed NERSA and the Provincial Government to address Emfuleni's failure to settle its debt obligations (Eskom Holdings SOC Limited v Emfuleni Local Municipality and Others [2023] ZAGPPHC 497; 94248/2019 (5 July 2023), para 26). By the middle of 2018, Eskom interrupted Emfuleni's electricity supply at certain hours of the day. The planned electricity interruption decision caused several large power users in Emfuleni to launch urgent proceedings to stop the implementation of the electricity interruptions (Eskom Holdings SOC Limited v Emfuleni Local Municipality and Others [2023] ZAGPPHC 497; 94248/2019 (5 July 2023), para 26). Consequently, Eskom was interdicted from executing the power interruption, and the large power users were allowed to pay amounts that they owed to the Emfuleni Local Municipality directly to Eskom. The payment arrangement was, however, an interim arrangement to curb Emfuleni's debt from spiralling (Eskom Holdings SOC Limited v Emfuleni Local Municipality and Others [2023] ZAGPPHC 497; 94248/2019 (5 July 2023), para 34).

Importantly, even in the context of the matter of Eskom Holdings SOC Limited v Emfuleni Local Municipality and Others ([2023] ZAGPPHC 497; 94248/2019 (5 July 2023), where the Court has ordered Eskom to retract electricity in the Emfuleni Local Municipality, the relief provided is deemed temporary, and the Order does not undo Emfuleni Local Municipality's license agreements (Eskom Holdings SOC Limited v Emfuleni Local Municipality and Others [2023] ZAGPPHC 497; 94248/2019 (5 July 2023), para 115). Hence, Eskom's stepping into the shoes of the Licensee to sell and provide electricity to related commercial entities in the jurisdiction of Emfuleni is only temporary and does not address the extended legacy of poor governance left by the coalition government in the Emfuleni Local Municipality, since this matter was enrolled in 2019. In fact, in the above instance, it can even be argued that the litigious impasse worsened the financial situation of the Municipality in that during the period a quo the finances of the Municipality even spiralled further out of control with the continued inability of the Municipality to pay its debt and compounded interest, during the same period (Eskom Holdings SOC Limited v Emfuleni Local Municipality and Others [2023] ZAGPPHC 497; 94248/2019 (5 July 2023), para 45).

It follows, however, an overview of the actual net effect of the payment arrangements to Eskom and the aftermath of the interdict preventing Eskom from exercising the electricity interruption decision, that the electricity debt of Emfuleni had increased from R1 billion in 2018 to R3,5 billion (Eskom Holdings SOC Limited v Emfuleni Local Municipality and Others [2023] ZAGPPHC 497; 94248/2019 (5 July 2023), para 45), which in the context of accountable governance means that the situation of the Emfuleni Local Municipality has further regressed into more service delivery turmoil and dysfunctionality.

In the context of realising accountable governance and mitigating poor governance, insight is gained that litigation also has limited potential and cannot remedy ongoing service delivery failures. Although the courts can intervene, as invited to in the matter of the Premier case, our courts are bound by the Bato Star principle in that the judiciary must only exercise powers allocated to it, as are the legislature and the executive also bound to execute the powers allocated to it, of which all three arms are better suited to decide on issues that fall within their related competence (Premier, Gauteng and Others v Democratic Alliance and Others, African National Congress v Democratic Alliance and Others (CCT 82/20; CCT 91/20) [2021] ZACC 34; 2021 (12) BCLR 1406 (CC); 2022 (1) SA 16 (CC) (4 October 2021); para 177). It follows that courts, in any instance, can only provide temporary reprieve and, accordingly, cannot take over the duties of municipalities; hence, the service delivery remains the responsibility of municipalities and must, therefore, be resolved from an intergovernmental perspective through the necessary monitoring and support or more importantly municipalities must own up and take up their responsibility and commence with executing their duties in the internal dimension in an ethical and accountable way.

In addition to the above mechanism available to the electorate, in the realisation of accountable governance and mitigation of poor governance, there are additional specialised units and tribunals in the public governance domain. The Special Investigating Unit was established as an independent statutory body under the Special Investigating Units and Special Tribunals Act (74 of 1996 (SIU Act).

The SIU is an essential external mechanism for investigating serious corruption, malpractice, and maladministration allegations in municipalities (Preamble of the Special Investigating Units and Special Tribunals Act 74 of 1996). This independent investigative unit, therefore, stands to protect the broader interests of the public and is legislatively empowered to recover any financial losses suffered by state institutions, including municipalities. Illustrations of the work done by the SIU include recoveries done by its Special Tribunal (section 7 of the Special Investigating Units and Special Tribunals Act, 74 of 1996), municipal employees were held liable for goods irregularly purchased in section 32 of the MFMA, as discussed previously in this article, under intragovernmental governance mechanisms (Matzikama Local Municipality vs Duneco (cc) and four others, WC/05/22, 23 June 2023).

Other mechanisms at the disposal of the electorate include access to information mechanisms, community complaint procedures like petitions, community protests, non-governmental action, and other local participatory measures. These mechanisms, similar to the other above mechanisms at the disposal of the electorate, provide intermediary and focused relief on specific service delivery problems but do not have the potential to provide long-term realisation of accountable governance and mitigation of poor governance caused by coalition failures.

The case for utilising (legislative) governance mechanisms to resolve dysfunctionality caused by coalition fallouts in local government.

The authors believe that various mechanisms in the local government domain may remedy governance deficits in municipalities and related governance deficits caused by failed coalitions. This can be done without constitutional interventions by another sphere of government.

Conclusion

Adverse dysfunctionality caused by failed coalitions can be improved using specific preventative and corrective governance mechanisms to prevent or remedy the negative consequences of governance failures. These include mechanisms from both the intragovernmental and electorate perspectives to participate in a more central role to hold the coalitions accountable.

Hereto, Karsten explains that local governance requires a mix of constituent ingredients, one core part of which is accountability on "the part of local authorities via the structures and functionaries of which it is comprised" (Karsten, 2022). It follows that notwithstanding any coalition fallout, coalition members as elected representatives remain accountable to their local communities and must ensure that service delivery is provided to its local communities through accountable governance. The intragovernmental actors, including senior managers, retain accountability in terms of the intragovernmental mechanisms established in municipalities (performance management, internal audit assessments, statutory compliance requirements, system of delegations and consequence management) and must, therefore, continue to be responsive to the needs of the local community and foster and accountable public service. Likewise, other spheres of government must maintain their monitoring and support roles to municipalities to allow them to regain or improve their ability to manage their affairs, exercise their powers and perform their functions. Therefore, the aforementioned multi-layered governance mechanisms can be used to enforce governance and service delivery failures of dysfunctional coalitions.

Unlike the facts presented in the Premier case, where the section 139 intervention was presented as an isolated mechanism to deter the supposed institutional ruins of a dysfunctional coalition, this article demonstrates that interrelated governance mechanisms can be used to maintain or restore proper governance and accountability in municipalities and do not necessarily have to come from a solitary intergovernmental perspective, e.g., from national or provincial government interventions.

The apparent concern from a statutory liability perspective is that, unlike other municipal actors like accounting officers, senior officials and administrative functionaries, elected representatives in municipalities cannot be held accountable in the same way as their administrative peers for service delivery failures and can only be voted out of office by the electorate. Although it is anticipated that the intergovernmental mechanisms and electorate-related mechanisms, as presented in this article, could maintain institutional integrity during coalition standoffs or coalition failures in municipalities, a higher degree of ethical stewardship is urgently required from elected representatives, more specifically, coalition governments in municipalities to ensure that they perform the functions of office in good faith, honestly and a transparent manner.

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Presented: August 2024
Included for Publishing: December 2024
Published: January 2025, Volume 16, Issue 31 Academicus International Scientific Journal