

CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 29/02

DEMOCRATIC ALLIANCE

First Appellant

MICHAEL SEAN MORIARTY

Second Appellant

versus

AMOS MASONDO N.O.

First Respondent

MINISTER OF PROVINCIAL AND
LOCAL GOVERNMENT

Second Respondent

Heard on : 14 November 2002

Decided on : 12 December 2002

JUDGMENT

LANGA DCJ:

[1] The issue in this matter is whether minority political parties in a municipal council are entitled to representation on a mayoral committee established under the provisions of the Local Government: Municipal Structures Act 117 of 1998 (the Structures Act). The appellants are respectively the main opposition party in the Johannesburg metropolitan council and the leader of its caucus in the council. The

first respondent is the executive mayor of that council and the second respondent is the national minister responsible for the administration of the Structures Act.

[2] The appellants contend that the current mayoral committee appointed by the first respondent is unconstitutional because minority parties are not represented on it. Only members of the African National Congress, the majority party in the council, have been appointed to the mayoral committee.

[3] The proceedings were initiated by the appellants in the High Court in Johannesburg. The Court held that the composition of the mayoral committee was neither in conflict with the relevant provisions of the Structures Act, nor with the Constitution. The application was dismissed with costs. What is before us is an appeal against that decision.

[4] The contention by the appellants that minority parties must be represented on the mayoral committee is based on their interpretation of section 60 of the Structures Act, read with the provisions of section 160(8) of the Constitution. Section 60 of the Structures Act provides:

- “(1) If a municipal council has more than nine members, its executive mayor—
 - (a) must appoint a mayoral committee from among the councillors to assist the executive mayor;
 - (b) may delegate specific responsibilities to each member of the committee;
 - (c) may delegate any of the executive mayor’s powers to the respective members; and
 - (d) may dismiss a member of the mayoral committee.

- (2) The mayoral committee must consist of the deputy executive mayor (if any) and as many councillors as may be necessary for effective and efficient government, provided that no more than 20 per cent of the councillors or 10 councillors, whichever is the least, are appointed.”

Section 160(8) of the Constitution provides:

“Members of a Municipal Council are entitled to participate in its proceedings and those of its committees in a manner that—

- (a) allows parties and interests reflected within the Council to be fairly represented;
- (b) is consistent with democracy; and
- (c) may be regulated by national legislation.”

[5] The appellants argued that on a proper construction of section 60(1)(a) of the Structures Act, read with the Constitution, the representation of minority parties is a requirement even though the subsection does not expressly say so. They contended further that if the provision is not capable of bearing such a meaning, it is inconsistent with section 160(8) of the Constitution, which requires the fair representation of minority parties and interests in the committees of a municipal council. It is relevant to mention that the appellants did not challenge the constitutional validity of the executive mayor exercising executive authority within the local government structures.

[6] The respondents, on the other hand, argued that neither the Constitution nor the Structures Act requires a mayoral committee to have minority party representation. They contended that a mayoral committee is not a committee of the municipal council

within the meaning of section 160(8) and the section accordingly has no application to it.

The constitutional and legislative scheme

[7] The framework for local government is contained in Chapter 7¹ of the Constitution and it is clear that, in this scheme, municipal councils occupy a central position. The Chapter provides, among other things, for the establishment of municipalities for the whole territory of the Republic;² sets out the relationship of local government with the national and provincial spheres of government and defines the internal powers and functions of municipal councils.³ In the national and provincial spheres of government, there is a distinct separation between the executive and legislative authority; in local government, the Constitution vests both the executive and legislative authority of a municipality in its municipal council.⁴

[8] The Constitution reserves a significant role for national legislation. A municipal council may elect an executive committee and other committees subject to national legislation.⁵ Such legislation may provide criteria for determining whether

¹ See *Certification of the Amended Text of the Constitution of the Republic of South Africa, 1996* 1997 (1) BCLR 1(CC); 1997 (2) SA 97 (CC) paras 72 - 82.

² Section 151(1) of the Constitution.

³ Section 156 of the Constitution.

⁴ Section 151(2) of the Constitution states—

“The executive and legislative authority of a municipality is vested in its Municipal Council.”

⁵ Section 160(1)(c) of the Constitution.

municipal councils may elect an executive committee or other committees as well as the size of such committees.⁶

[9] There is no express mention of the institution of the mayor or a mayoral committee in Chapter 7, but the Constitution clearly envisages the enactment of legislation to elaborate on and regulate the powers and functions of a municipal council and its organs. In particular, section 164 of the Constitution provides for national and provincial legislation to govern any area not dealt with by the Constitution.⁷ One of the areas specifically designated by the Constitution to be dealt with by national legislation is to define the “types” of municipality.⁸ The executive mayoral system is one of the types determined by the Structures Act.⁹

[10] The Constitution also envisages the delegation of certain functions of a municipal council to its various organs. Section 160(2) however prescribes that

⁶ Section 160(5)(b) and (c) of the Constitution.

⁷ Section 164 of the Constitution states:

“Any matter concerning local government not dealt with in the Constitution may be prescribed by national legislation or by provincial legislation within the framework of national legislation.”

See also section 155(3), 155(4), section 157, section 158(1)(b) and section 160(5) which also provide for the elaboration of constitutional principles through national legislation.

⁸ Section 155(2) of the Constitution states that—

“National legislation must define the different types of municipality that may be established within each category.”

⁹ Part 2 of Chapter I of the Structures Act sets out the different types of municipalities.

certain important powers and functions of the municipal council may not be delegated.¹⁰

[11] In terms of section 160(6)(c) the municipal council “may make by-laws which prescribe rules and orders for the establishment, composition, procedures, powers and functions of its committees”. Finally, section 160(8) provides for committees of a municipal council to be fairly representative. It is this provision which is in issue in this case.

[12] The Structures Act and the Local Government: Municipal Systems Act 32 of 2000 (the Systems Act) were enacted to give effect to the provisions of Chapter 7 of the Constitution. The Structures Act provides for three types of executive systems in municipal governance: a plenary executive system, an executive committee (or collective executive) system and the executive mayoral system. In the plenary system, all executive and legislative decisions are taken by the whole council.¹¹ In the executive committee system, the municipal council elects an executive committee to which the executive functions of the municipal council are delegated subject to the Constitution and other legislation.¹² The Structures Act expressly requires that the

¹⁰ Section 160(2) of the constitution says:

- “The following functions may not be delegated by a Municipal Council:
- (a) The passing of by-laws;
 - (b) the approval of budgets;
 - (c) the imposition of rates and other taxes, levies and duties; and
 - (d) the raising of loans.”

¹¹ Section 7(c) of the Structures Act. See also sections 9(e), 9(f) and 10(c) of the Structures Act.

¹² Section 7(a) of the Structures Act. Part 1 of Chapter 4 of the Structures Act governs municipalities where there is an executive committee system.

executive committee “must be composed in such a way that parties and interests represented in the municipal council are represented in the executive committee in substantially the same proportion they are represented in the council.”¹³ In an executive mayoral system, executive power is delegated to the executive mayor.¹⁴ The delegation is however also regulated by the Constitution and relevant national legislation. The Johannesburg municipal council has an executive mayoral system. Since the council has more than nine members, the executive mayor is obliged to appoint a mayoral committee from among the members of the council.

[13] Section 60(1) gives the power to the executive mayor to appoint members of the mayoral committee and to dismiss them. The function of the mayoral committee is to assist the executive mayor. The executive mayor also has the power to delegate specific responsibilities, executive powers and functions to members of the mayoral committee. The mayor’s power to delegate is, however, not completely unfettered. In terms of section 60(3) the municipal council may designate certain of the executive mayor’s powers and functions to be “. . . exercised and performed by the executive mayor together with the other members of the mayoral committee.”¹⁵

[14] Section 79 of the Structures Act governs the establishment of committees “necessary for the effective and efficient performance of any of its functions or the

¹³ Section 43(2) of the Structures Act.

¹⁴ Section 7(b) of the Structures Act. Part 2 of Chapter 4 of the Structures Act governs municipalities which have an executive mayoral system.

¹⁵ Section 60(3) of the Structures Act.

exercise of any of its powers” by a municipal council. Section 80 is concerned with the appointment of committees of councillors by a municipal council to assist the executive mayor. It provides, in relevant part, as follows:

“80. Committees to assist . . . executive mayor—

- (1) If a municipal council has an . . . executive mayor, it may appoint in terms of section 79, committees of councillors to assist the . . . executive mayor.
- (2) Such committees may not in number exceed the number of members of the . . . mayoral committee.
- (3) The . . . executive mayor—
 - (a) appoints a chairperson for each committee from the . . . mayoral committee;
 - (b) may delegate any powers and duties of the . . . executive mayor to the committee;
 - (c) is not divested of the responsibility concerning the exercise of the power or the performance of the duty; and
 - (d) may vary or revoke any decision taken by a committee, subject to any vested rights.
- (4) Such a committee must report to the . . . executive mayor in accordance with the directions of the . . . executive mayor.”

Is the mayoral committee a committee of the municipal council?

[15] The appellants contend that since executive authority is vested in the municipal council, any committee that exercises that authority is a committee of the council within the meaning of section 160(8) of the Constitution. If the submission is correct, it would follow that the mayoral committee is a committee of the municipal council to which the requirement of minority party representation is applicable. In order to establish the validity of the submission, it is necessary to have regard to the relevant

constitutional provisions, in particular section 160, as well as the objects of local government as envisaged by the Constitution.

[16] The objects of local government as set out in section 152 of the Constitution are:

- “(a) to provide democratic and accountable government for local communities;
- (b) to ensure the provision of services to communities in a sustainable manner;
- (c) to promote social and economic development;
- (d) to promote a safe and healthy environment; and
- (e) to encourage the involvement of communities and community organisations in the matters of local government.”

[17] The first of these objects or purposes is the development and promotion of democracy. As correctly pointed out by O’Regan J, this is an important transformative goal as the nation is emerging from an era where democracy was denied to the majority of the population. It involves ensuring that the will of the majority prevails and also that the views of the minority are considered. The second purpose, however, is equally important. It is to ensure that government is efficient and effective in the rendering of services and the promotion of social and economic development. The two purposes are mutually reinforcing – they give meaning to each other. They are both indispensable to the enormous task of reconstructing society in the functional areas of local government.

[18] Section 160(8) is couched in terms very similar to provisions concerning the national legislature (section 57(2)(b)) and the provincial legislatures (section

116(2)(b)). The purpose of these provisions is to ensure that minority parties can participate meaningfully in the deliberative processes of parliament, provincial legislatures and municipal councils respectively. In the context of local government, this form of representation finds expression in the municipal council and in committees elected by it. On the other hand, Sections 91 and 132 of the Constitution which deal with the executive in the national and provincial governments respectively, do not require minority party representation. This is so because the primary purpose of an executive committee and committees which perform executive functions is to ensure effective and efficient government and service delivery.

[19] The primary function of the mayoral committee is not concerned with the deliberative process, but with rendering assistance to the mayor in the exercise of his or her authority. This is with a view to ensuring efficient and effective government at local government level. The powers and functions of the executive mayor are set out in section 56 of the Structures Act.¹⁶

¹⁶ Section 56 of the Structures Act states:

“56. Functions and powers of executive mayors.—

- (1) An executive mayor is entitled to receive reports from committees of the municipal council and to forward these reports together with a recommendation to the council when the matter cannot be disposed of by the executive mayor in terms of the executive mayor’s delegated powers.
- (2) The executive mayor must—
 - (a) identify the needs of the municipality;
 - (b) review and evaluate those needs in order of priority;
 - (c) recommend to the municipal council strategies, programmes and services to address priority needs through the integrated development plan, and the estimates of revenue and expenditure, taking into account any applicable national and provincial development plans; and
 - (d) recommend or determine the best way, including partnership and other approaches, to deliver those strategies, programmes and services to the maximum benefit of the community.
- (3) The executive mayor in performing the duties of office, must—
 - (a) identify and develop criteria in terms of which progress in the implementation of the strategies, programmes and services referred to in

[20] This approach is supported by the textual context. Section 160(1)(c) of the Constitution speaks of committees elected by the municipal council. Sub-section 5 likewise refers to elected committees. Both sections 160(6)(c) and 160(8) merely refer to “*its*” committees without giving an indication as to what the requirements are for a particular committee to fall within their scope. On a contextual reading of these provisions, it is clear, in my view, that the committees referred to in sections 160(6)(c) and 160(8) (the committees of a municipal council) are the same committees that are referred to in sections 160(1)(c) and 160(5)(b), namely, committees which are elected by the municipal council.

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- subsection (2)(c) can be evaluated, including key performance indicators which are specific to the municipality and common to local government in general;
 - (b) evaluate progress against the key performance indicators;
 - (c) review the performance of the municipality in order to improve—
 - (i) the economy, efficiency and effectiveness of the municipality;
 - (ii) the efficiency of credit control and revenue and debt collection services; and
 - (iii) the implementation of the municipality’s by-laws;
 - (d) monitor the management of the municipality’s administration in accordance with the directions of the municipal council;
 - (e) oversee the provision of services to communities in the municipality in a sustainable manner;
 - (f) perform such duties and exercise such powers as the council may delegate to the executive mayor in terms of section 32;
 - (g) annually report on the involvement of communities and community organisations in the affairs of the municipality; and
 - (h) ensure that regard is given to public views and report on the effect of consultation on the decisions of the council.
- (4) An executive mayor must perform a ceremonial role as the municipal council may determine.
 - (5) An executive mayor must report to the municipal council on all decisions taken by the executive mayor.
 - (6) The deputy executive mayor of a municipality exercises the powers and performs the duties of the executive mayor if the executive mayor is absent or not available or if the office of the executive mayor is vacant.”

[21] The local government system is a hybrid one in that both executive and legislative authority is vested in the municipal council. It should be noted, however, that the powers of a municipal council to delegate are wide. The executive mayor is an organ of state and in terms of section 238 of the Constitution legislation may make provision for a local authority to delegate powers to him or her as well as to other political structures or office bearers, such as a city manager.¹⁷ These are structures and office bearers that are provided for and regulated by the national legislation envisaged in sections 164 and 155(2) of the Constitution. Delegation of the authority of the municipality is now governed by section 59 of the Systems Act¹⁸ and section 56 of the Structures Act. There has been no challenge to the constitutionality of either of these provisions.

[22] It is, in my view, not correct to emphasise the importance of one aspect only of the purposes of local government. The democratic principle and the requirement of minority party representation in the deliberative processes of government are important, but so is the need for effective and efficient delivery of services. The Constitution accordingly allows the legislature the leeway to determine *how* those purposes should be achieved by local government. The Constitution permits the delegation of powers and functions by a municipal council but requires that this

¹⁷ Section 238(a) of the Constitution states:

“An executive organ of state in any sphere of government may—
(a) delegate any power or function that is to be exercised or performed in terms of legislation to any other executive organ of state, provided the delegation is consistent with the legislation in terms of which the power is exercised or the function is performed”.

¹⁸ Section 59 of the Systems Act is substantially similar to section 32 of the Structures Act which has been repealed.

should be determined and regulated by national legislation. In this the legislature is afforded a certain amount of flexibility subject always to the provisions of the Constitution.

[23] If the council can delegate authority to a city manager or an executive mayor, section 160(8) of the Constitution has no application to the delegation. Nor does it have application to the mayor appointing a personal committee chosen by her or him to share the responsibilities of office. Such a committee is simply not the type of committee contemplated by section 160(8). It is not a committee of the council. Its function is to assist the mayor discharge the responsibilities of office. The mayor is entitled to choose that committee because he or she is personally responsible for what it does. To force the mayor to choose a multiparty committee to discharge these responsibilities would be to blur the distinction between an executive mayoral system and an executive committee system.

[24] The Structures Act does not, in terms, describe the mayoral committee as a committee of the municipal council, nor does it expressly require that the mayoral committee should have minority party representation. Moreover, there appears to be no basis for implying the conclusion contended for by the appellants. On the contrary, there are a number of factors that point to a deliberate distinction in the Structures Act between committees of the municipal council and the mayoral committee.

[25] The first is that section 60(1)(a) is clear and unambiguous. All the powers in section 60(1) to appoint, dismiss and to delegate are given to the executive mayor. The municipal council cannot appoint the members of the mayoral committee and cannot dismiss them except by removing the executive mayor in terms of section 58 of the Structures Act. Also significant is the fact that the mayoral committee dissolves if and when the mayor ceases to hold office.

[26] The second factor is that in dealing with a different kind of executive authority, namely, the executive committee system, the Structures Act expressly requires that the executive committee be composed in a manner that ensures proportionality in the representation of parties and interests in the council.¹⁹ No such requirement is expressed in the case of a mayoral committee. This fact may not be sufficient in and of itself to point to the mayoral committee not being a committee of the municipal council, but it supports the clear intention of section 60.

[27] The third factor concerns the provisions of sections 79 and 80 of the Structures Act. The committees envisaged in these two sections are clearly committees of the municipal council. Committees established under section 80 have the same stated purpose as that of the mayoral committee – to assist the executive mayor. The Structures Act, however, provides for them to be appointed by different institutions, one by the municipal council and the other by the executive mayor. The nature of their relationship to each other and to the executive mayor is provided for in section

¹⁹ Section 43(2) of the Structures Act.

80(3) of the Structures Act. There is a direct link between members of the mayoral committee and the executive mayor, who has control over them. On the other hand, the link with the councillors appointed by the municipal council is indirect, with members of the mayoral committee being installed by the executive mayor as chairpersons for the respective committees. The distinction made by the Structures Act between the mayoral committee and the respective municipal committees is a deliberate one and, in my view, is a powerful indicator against the interpretation contended for by the appellants.

[28] The appellants have however pointed to the power of the municipal council under section 60(3) of the Structures Act to designate powers and functions that the executive mayor may not exercise or perform alone, but together with members of the mayoral committee. They argued that this is an indication that the mayoral committee is a committee of the municipal council and that the Structures Act did not intend to treat it as something different. It was argued that if the mayoral committee is a creature of the executive mayor, the mayor should alone determine the form of assistance that should be rendered by the mayoral committee. I do not agree.

[29] The council's power to designate constrains, rather than enhances, the executive mayor's power to allocate responsibilities and to delegate the executive mayor's powers to members of the mayoral committee. Although the municipal council delegates its executive powers and functions to an executive mayor, the municipal

council has the ultimate responsibility for “efficient, effective and transparent”²⁰ governance at municipal level. The municipal council’s power to designate is entirely consistent with the principle that the executive authority of the municipality vests in the municipal council²¹ and that it “makes decisions concerning the exercise of all the powers and the performance of all the functions of the municipality”.²² The executive mayor is directly responsible and accountable to the municipal council and is required to report to it on all decisions taken by the executive mayor.²³

[30] What the Structures Act does is to permit the municipal council to insist that the executive mayor may not exercise certain specific powers or perform certain functions alone, but must do so jointly with members of the mayoral committee. The effect of this is to limit the executive mayor’s freedom to delegate powers or functions to members of the mayoral committee. It also means that the municipal council decides on the allocation of certain of the executive mayor’s powers or functions to particular members of the mayoral committee to be exercised or performed in conjunction with the executive mayor. To that extent, the municipal council exerts a measure of influence on members of the mayoral committee with regard to the scope of their work. There is, however, no provision for members of the mayoral committee to report or account directly to the municipal council. They report and remain accountable to the executive mayor. Nowhere is the municipal council given direct

²⁰ See the preamble to the Systems Act.

²¹ Section 151(2) of the Constitution.

²² Section 160(1)(a) of the Constitution.

²³ Section 56(5) of the Structures Act.

control over members of the mayoral committee. Section 80(3), however, empowers the municipal council to regulate the exercise and performance of the executive mayor's powers and functions.

[31] The Structures Act makes provision for minority parties to participate both in the executive committee system and in the executive mayoral system. In the executive committee system, this is achieved by requiring that the members of the executive committee be representative of minority parties and interests. In the executive mayoral system this is achieved by providing that the municipal council may establish committees, in which minority parties are represented, to assist the executive mayor. The executive mayor, however, has the added facility of another committee, appointed not by the council but by the executive mayor personally, to assist in the performance of the important executive duties delegated to him or her. The municipal council moreover has the option of choosing which executive powers or functions the executive mayor may not delegate but must perform jointly with the mayoral committee.

[32] Apart from section 56(3)(f) of the Structures Act, the executive mayor is responsible for oversight and policy formulation and all decisions taken by her or him must be reported to the municipal council. Minority parties have adequate protection under the Constitution to make their views known when the Council deals with such matters.

[33] I am satisfied that the mayoral committee is not a committee of the municipal council as contemplated in section 160(8) of the Constitution. It follows that the provisions of section 160(8) are not applicable to the composition of the mayoral committee.

The Constitutionality of section 60(1)(a) of the Structures Act

[34] The appellants contend that if section 60(1)(a) is found by this Court not to require minority party representation on a mayoral committee, it is unconstitutional to the extent that it is in conflict with section 160(8) of the Constitution. I have found that the mayoral committee does not fall within the scope of section 160(8). The provisions of the section therefore have no relevance to the appointment by the executive mayor of a mayoral committee. It follows that neither the Structures Act nor the Constitution require the mayoral committee to have minority party representation. In the circumstances, I also find that section 60(1)(a) of the Structures Act does not conflict with the Constitution. The appeal must accordingly fail.

Costs

[35] In the High Court, the appellants were ordered to pay costs. The respondents have asked for costs in this Court in the event of their being successful. The issues at stake are important matters of public interest affecting local government structures throughout the Republic. I consider that an appropriate order in this Court is for each party to pay its own costs.

Order

[36] The following order is made:

The appeal is dismissed. Each party is to pay its own costs.

Chaskalson CJ, Goldstone J, Kriegler J, Mokgoro J, Ngcobo J and Yacoob J concur in the judgment of Langa DCJ.

SACHS J:

[37] I agree with O'Regan J that the mere fact that the mayoral committee is appointed by and answerable to the mayor and not the council, does not exempt it from being considered "a committee of the council" subject to the fair representation requirements of section 160(8)(a) of the Constitution. I believe, however, that the converse also holds true: the mere fact that people function as a committee engaged in work for the council, does not automatically constitute them into "a committee of the council".

[38] The issue is not whether in literal terms the phrase "committee of the council" is broad enough to include the mayoral committee – clearly it is – but whether constitutionally speaking it must be so regarded. In this respect, I agree with much of the eloquent and forceful reasoning in the judgment of O'Regan J, particularly in

relation to the importance of the principle of inclusivity at the local government level. In South African conditions much of the work of overcoming the divisive effects on public life of apartheid has to be done at this level. The healing and transformation of our cities and villages will be enhanced if, to use current terminology, all role-players or stakeholders as represented on the council, take part in the work of the committees of the council. Further, the development of a shared spirit of civic responsibility is promoted by mechanisms that encourage civility and mutual accommodation in the conduct of council business. At the same time, the requirement that diverse participation in committee activity should be “consistent with democracy”,¹ emphasises that however desirable consensus-seeking might be, it is a procedurally encouraged objective, and not a substantively required obligation. In the end, after participatory processes have been followed, decisions in the council and its committees are taken democratically by majority vote. Nevertheless, while accepting these broad principles and agreeing with much of O’Regan J’s characterisation of local government, and not without some hesitation, I have come to conclusions that differ from hers and coincide with those of Langa DCJ. I give my reasons briefly below. Since the relevant constitutional and statutory texts are set out comprehensively in the majority and minority judgments, I will not repeat them here.

[39] The starting off point of the analysis must be to construe the Structures Act in the light of the Constitution, and not the Constitution in the light of the Structures Act. Thus, the problem of deciding whether the mayoral committee is covered by the

¹ Section 160(8)(b) of the Constitution.

provisions of section 160(8)(a) cannot be resolved simply by the descriptive and question-begging statement that it is “a committee of the mayor”, and not “a committee of the council”. Indeed, there is no reason, in principle, why a committee of the mayor should not be regarded as a committee of the council: the two terms are not mutually exclusive. Up to this point I agree with the approach adopted by O’Regan J. I do not, however, accept her conclusion that the Structures Act is reasonably capable of being read so as to require proportionate multiparty representation on the mayoral executive committee. To my mind the language used and the purposes made manifest in the Act point incontrovertibly in the opposite direction.

[40] The very purpose of providing for a distinct mayoral executive committee system is to create an alternative to the executive committee system (where proportionality has to be observed). The mayoral committee not only has a different composition from an executive committee, it has a different nature. It is manifestly designed to be appointed by and answerable directly to the mayor, and to serve as a mayoral team similar to the way the national and provincial executives work with the President and Premiers respectively. The power given to the mayor unilaterally to appoint members of the committee is incompatible with the purposes underlying fair representation as delineated by O’Regan J. If the mayor, rather than the parties concerned, could choose who should be on the mayoral committee, as well as who could be sacked from it, the spirit of inclusive multiparty democracy contended for would be compromised rather than enhanced. Thus I cannot see how minority representation could be considered fair if the mayor is at large to choose his or her

favourites from the parties concerned, and disregard the nominees of the parties themselves. Yet this, I believe, would be the consequence of adopting the interpretation advanced by O'Regan J. To my mind, the mayoral executive committee and section 160(8)(a) cannot be married. The text and spirit of the Act prevent such a union.

[41] The real and difficult question for me is whether the objective of having a strong mayor with a strong and unified mayoral executive team directly answerable to him- or herself, and not reflecting the broad political diversity on the Council, is compatible with section 160(8)(a). In the absence of clear textual pointers going either way it is necessary to look at section 160(8)(a) and determine its reach in the context of Chapter 7 as a whole and to examine the basic features of democracy at the local government level as envisaged by the Constitution.

[42] The requirement of fair representation emphasises that the Constitution does not envisage a mathematical form of democracy, where the winner-takes-all until the next vote-counting exercise occurs. Rather, it contemplates a pluralistic democracy where continuous respect is given to the rights of all to be heard and have their views considered. The dialogic nature of deliberative democracy has its roots both in international democratic practice and indigenous African tradition. It was through dialogue and sensible accommodation on an inclusive and principled basis that the Constitution itself emerged. It would accordingly be perverse to construe its terms in

a way that belied or minimised the importance of the very inclusive process that led to its adoption, and sustains its legitimacy.

[43] The open and deliberative nature of the process goes further than providing a dignified and meaningful role for all participants. It is calculated to produce better outcomes through subjecting laws and governmental action to the test of critical debate, rather than basing them on unilateral decision-making. It should be underlined that the responsibility for serious and meaningful deliberation and decision-making rests not only on the majority, but on minority groups as well. In the end, the endeavours of both majority and minority parties should be directed not to exercising (or blocking the exercise) of power for its own sake, but at achieving a just society where, in the words of the Preamble, “South Africa belongs to all who live in it . . .”. At the same time, the Constitution does not envisage endless debate with a view to satisfying the needs and interests of all. Majority rule, within the framework of fundamental rights, presupposes that after proper deliberative procedures have been followed, decisions are taken and become binding. Accordingly, an appropriate balance has to be established between deliberation and decision.

[44] A third basic feature of the manner in which local government is to function relates to the need of government to devise and implement policies which respond to the pressing requirements of the people of South Africa.² At the level of local government these responsibilities expressly include ensuring the provision of services

² See the Preamble and the tasks and responsibilities allocated to the different spheres of government.

in a sustainable manner, and promoting social and economic development.³ The effective delivery of services is therefore at the heart of local government.

[45] In my view, therefore, in the absence of clear textual signifiers to indicate its meaning, the determination of what is covered by the phrase “committees of the council” has to be made in the light of the three mutually reinforcing values of inclusivity, democracy and efficacy. All are central to local government and have to be reconciled and balanced in an appropriate manner.

[46] With these considerations in mind, I turn to a consideration of the place of mayoral executive committees in the scheme of local government. The objective is to determine whether they fall within the ambit of the term “committees of the council” as used in section 160(8)(a).

[47] A striking feature of Chapter 7 dealing with local government, is the absence of detailed provisions concerning executive and legislative structures, such as are to be found in the national and provincial spheres of government. Thus, no provision is made for the institution of a governmental leader equivalent to the President or Premier, who act together with Cabinet and the provincial executive respectively. Section 160 simply provides that the council must elect a chairperson, and may elect an executive committee or other committees. Coupled with this notable absence of particularity regarding council leadership is an express requirement that national

³ Sections 152(1)(b) and (c) of the Constitution.

legislation be used to fill in gaps or provide a regulatory framework. Section 164, for which there is no equivalent provision in relation to national and provincial government, has a particularly wide sweep. It states:

“Any matter concerning local government not dealt with in the Constitution may be prescribed by national legislation or by provincial legislation within the framework of national legislation.”

[48] Because the Constitution is silent on the question of the kind of executive leadership that councils may have, I regard it as one of the areas not dealt with in the Constitution and accordingly left for legislative determination. The Structures Act fills the lacuna by providing for three forms of municipal executives. I see no reason in principle why one of the forms, namely, a team clustered around the mayor with strong policy-making powers, intended to drive the process of delivery in a coherent way, should not in structural terms coexist with committees elected by the council as contemplated by section 160. Nor do I see anything in section 160 which either prevents members of the mayoral team from heading the elected committees of the council, or else requires these teams to function in a multiparty way. The legislation presupposes that the very purpose of knitting together our divided communities, as persuasively outlined by O’Regan J, could better be served by a strong, cohesive mayoral team, agreed on basic philosophy, than by a divided one in which different “portfolios” were headed by people of different persuasions pulling in different directions.

[49] Section 160 does not purport to cover the field as far as committees are concerned. It leaves space for the mayor to act with a mayoral team which need not be diversely representative in the way that the council committees contemplated by the section must be. The purpose of such a team working closely with and accountable to the mayor would be to strengthen the capacity of the mayor to give effective leadership to the council in dealing with its many heavy responsibilities. There is no evidence before us that the mayoral teams are designed to undermine the deliberative functions of the ordinary committees of the council. At the end of the day, all are answerable to the council, where appropriate space must be given for minority voices to be heard and diverse interests acknowledged.

[50] Thus I do not find that the mayoral committees as envisaged in the Act in themselves deprive section 160(8)(a) of efficacy. Should it turn out in practice that these mayoral committees are used in such a way as to circumvent, negate, or suppress the proper functioning of committees of the council rather than to activate and guide them, then appropriate constitutional remedies could be sought on a case by case basis. Such remedies would, however, be based on the manner of implementation of the Act rather than on constitutional defects in the Act itself. Accordingly, I do not find anything in the Structures Act that prevents it from being applied in a manner consistent with achieving a constitutionally mandated and functionally appropriate balance between the principles of inclusivity, democracy and efficacy. I concur in the judgment of Langa DCJ.

O'REGAN J:

[51] I have had the opportunity of reading the judgment written by my colleague, Langa DCJ, with which I am unable to agree for the reasons I set out in this judgment. As Langa DCJ states, the issue before us is whether mayoral committees as contemplated by section 60 of the Local Government: Municipal Structures Act 117 of 1998¹ (the Structures Act) are “committees of municipal councils” as contemplated by section 160(8) of the Constitution.²

[52] To answer this question, we need to understand first what section 160(8) of the Constitution means. It is important to emphasise that in deciding whether mayoral committees are councils contemplated by the Constitution or not, the answer must lie

¹ Section 60 provides that:

- “(1) If a municipal council has more than nine members, its executive mayor—
 - (a) must appoint a mayoral committee from among the councillors to assist the executive mayor;
 - (b) may delegate specific responsibilities to each member of the committee;
 - (c) may delegate any of the executive mayor’s powers to the respective members; and
 - (d) may dismiss a member of the mayoral committee.
- (2) The mayoral committee must consist of the deputy executive mayor (if any) and as many councillors as may be necessary for effective and efficient government, provided that no more than 20 per cent of the councillors or 10 councillors, whichever is the least, are appointed.”

² Section 160(8) provides that:

- “Members of a Municipal Council are entitled to participate in its proceedings and those of its committees in a manner that—
- (a) allows parties and interests reflected within the Council to be fairly represented;
 - (b) is consistent with democracy; and
 - (c) may be regulated by national legislation.”

primarily in the meaning of the Constitution, not in the Structures Act. The Structures Act must be interpreted in the light of the Constitution and not the other way round. The Structures Act can shed no light on the meaning of section 160(8), and to the extent Langa DCJ's judgment relies on the Structures Act for that purpose, I am in respectful disagreement.

[53] The question needs to be approached first by a consideration of section 160(8) of the Constitution in its constitutional and historical context. Chapter 7 of the Constitution regulates local government, which is the third sphere of government after the national sphere and the provincial sphere. It is, however, quite different in conception and function to those other two spheres of government. Unlike the structures of national and provincial government, section 151 of the Constitution provides that the executive and legislative authority of municipalities is vested in its municipal council. The objects of local government, too, are different to those of national and provincial government and are narrowly focussed on local communities, their development, environment and the quality of life of their inhabitants. As section 152(1) stipulates, the objects of local government are:

- “(a) to provide democratic and accountable government for local communities;
- (b) to ensure the provision of services to communities in a sustainable manner;
- (c) to promote social and economic development;
- (d) to promote a safe and healthy environment; and
- (e) to encourage the involvement of communities and community organisations in the matters of local government.”

[54] These objects need to be understood in the context of the functions of local government which are provided for in Part B of Schedule 4 and Part B of Schedule 5 to the Constitution. The functional areas listed in Schedule 4, Part B include air pollution, building regulations, child care facilities, electricity and gas reticulation, firefighting services, local tourism, municipal airports, municipal planning, municipal health services, municipal public transport, stormwater management systems, trading regulations and water supply. The functional areas listed in Schedule 5, Part B include beaches and amusement facilities, billboards, cemeteries and crematoria, cleansing, control of public nuisances, control of undertakings that sell liquor and food to the public, fencing and fences, dog licensing, local sports facilities, markets, abattoirs, municipal parks and roads, pounds, refuse removal, street trading and lighting and traffic regulation. Other functional areas may be assigned to local government by national and provincial legislation.³ Local government is thus concerned with the provision of services to members of its community, perhaps most obviously power, water and refuse removal as well as important community facilities.

[55] The Constitution envisages that local government is the primary tier of government and that closest to the people. In a variety of ways, it seeks to ensure that the citizens affected by the decisions of the local council will be those who make the decisions. So it provides that municipal councillors must be drawn from the

³ Section 156(1)(b) of the Constitution provides that:

“A municipality has executive authority in respect of, and has the right to administer—

 (b) any other matter assigned to it by national or provincial legislation.”

communities which they seek to represent⁴ and emphasises the importance of involving communities and community organisations in matters of local government.⁵

The historical context

[56] These provisions of the Constitution need to be understood against the history of local government in our country. As this Court has observed before,⁶ perhaps nowhere is the legacy of apartheid regulation more visible than in the spatial ordering of our towns. The combined effect of the Group Areas Act,⁷ the Natives (Urban

⁴ Sections 158(1) read with section 157(5) of the Constitution. Section 158(1) provides as follows:

- “(1) Every citizen who is qualified to vote for a Municipal Council is eligible to be a member of that Council, except—
- (a) anyone who is appointed by, or is in the service of, the municipality and receives remuneration for that appointment or service, and who has not been exempted from this disqualification in terms of national legislation;
 - (b) anyone who is appointed by, or is in the service of, the state in another sphere, and receives remuneration for that appointment or service, and who has been disqualified from membership of a Municipal Council in terms of national legislation;
 - (c) anyone who is disqualified from voting for the National Assembly or is disqualified in terms of section 47(1)(c), (d) or (e) from being a member of the Assembly;
 - (d) a member of the National Assembly, a delegate to the National Council of Provinces or a member of a provincial legislature; but this disqualification does not apply to a member of a Municipal Council representing local government in the National Council; or
 - (e) a member of another Municipal Council; but this disqualification does not apply to a member of a Municipal Council representing that Council in another Municipal Council in a different category.”

Section 157(5) provides that “A person may vote in a municipality only if that person is registered on that municipality’s segment of the national common voters roll.”

⁵ Section 152(1)(e).

⁶ See *Western Cape Provincial Government and Others: In re DVB Behuising (Pty) Ltd v North West Provincial Government and Another* 2001 (1) SA 500 (CC); 2000 (4) BCLR 347 (CC) at paras 41-7 and *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others* 1999 (1) SA 374 (CC); 1998 (12) BCLR 1458 (CC) at para 2.

⁷ Act 41 of 1950.

Areas) Consolidation Act,⁸ the Reservation of Separate Amenities Act⁹ and other similar legislation was to ensure that residential areas were divided along racial lines and that high-quality facilities, including sports grounds, libraries, community centres and municipal parks were reserved for the white community. The provision of basic services including water, power and the removal of refuse were often provided only to the white suburbs and not to the black townships; and paved roads and water reticulated sewerage were often to be found in white areas but not in the adjacent black areas.

[57] The legacy of the apartheid era therefore is that our towns are deeply divided. Eight years after the dawn of the democratic era, this remains so. There is much to be done to achieve the constitutional vision of a society in which “the divisions of the past”¹⁰ have been healed. The unjust and unequal allocation of resources over decades, indeed centuries, means that those who live in formerly white suburbs generally have better services and conditions of life than those who live in the townships formerly reserved for black people, and still, as a matter of fact, largely occupied by black people. These disparities were graphically captured by Kriegler J in his judgment in *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council*¹¹ as follows:

⁸ Act 25 of 1945.

⁹ Act 49 of 1953.

¹⁰ Preamble to the Constitution.

¹¹ Above n 6 at para 122.

“The apartheid city, although fragmented along racial lines, integrated an urban economic logic that systematically favoured white urban areas at the cost of black urban and peri-urban areas. The results are tragic and absurd: sprawling black townships with hardly a tree in sight, flanked by vanguards of informal settlements and guarded by towering floodlights, out of stonethrow reach. Even if only a short distance away, nestled amid trees and water and birds and tarred roads and paved sidewalks and streetlit suburbs and parks, and running water, and convenient electrical amenities . . . we find white suburbia.”

[58] It is also important to recall that until the beginning of the last decade, there were different systems of local government based on race. White towns were governed by municipal councils which were directly elected by the ratepayers. Black townships were governed differently: initially by township managers under the Black Administration Act,¹² and then subsequently by local councils whose jurisdiction was limited to the black townships only. This racially fragmented system of local government meant that the transition in the sphere of local government presented particularly complex challenges.¹³ From 1993 until the local government elections were held in 1999, this process was managed in terms of the Local Government Transition Act 209 of 1993. It was essentially a three-phase process in terms of which local negotiating forums were first established in each town on which all existing local government authorities were represented, as well as political parties and organisations previously excluded from local government. The establishment of these forums was

¹² Act 38 of 1927.

¹³ This process has been described in judgments of this Court. See *Executive Council, Western Cape Legislature and Others v President of the Republic of South Africa and Others* 1995 (4) SA 877 (CC); 1995 (10) BCLR 1289 (CC) at paras 177–82 (per Kriegler J); *Fedsure Life Assurance* above n 6 at paras 3-7 (per Chaskalson P, Goldstone and O'Regan JJ) and at paras 121-30 (per Kriegler J). See also the discussion in *Pretoria City Council v Walker* 1998 (2) SA 363 (CC); 1998 (3) BCLR 257 (CC) at paras 17-20 (per Langa DP).

followed by the first set of local government elections in 1995, when members of interim local councils were elected, the final phase consisted of and finally to the election of municipal councils in 1999.

[59] Throughout the process of local government transition, there was considerable autonomy for local resolution of local problems – so that local negotiating forums and then interim councils were forced to co-operate and jointly address the inequitable legacy of the past. The institutional transition in local government is now complete, though the transformation of the towns themselves remains a work in progress. Local government is governed by Chapter 7 of the Constitution together with three key statutes: the Local Government: Municipal Demarcation Act 27 of 1998, the Local Government: Municipal Systems Act 32 of 2000 and the Local Government: Municipal Structures Act 117 of 1998 (the Structures Act) – which is the legislation with which we are concerned in this case.

The constitutional provisions

[60] Having sketched this historical context, I turn now to consider the provisions of section 160. The title of the section is “Internal Procedures” and section 160(1)(a) provides that a municipal council makes “decisions concerning the exercise of all the powers and the performance of all the functions of the municipality”. This needs to be read with section 151(2) which states that the executive and legislative authority is vested in the municipal council. Unlike the other spheres of government, therefore, there is no institutional split between the arms of government entrusted with

legislative authority on the one hand and executive authority on the other. Both are vested in the municipal council. This difference is understandable in the light of the nature of the functions of local government. They are not the high affairs of state – defence, foreign affairs, justice and security, but matters concerning delivery of services and facilities to local communities: power, water, waste management, parks and recreation and decisions concerning the development and planning of the municipal area. Thus executive decisions of municipal councils will ordinarily be decisions which have direct effect on the lives and opportunities of those living in the area.

[61] Section 160 of the Constitution also provides that the municipal council must elect its chairperson¹⁴ and, subject to national legislation, may elect an executive committee and other committees.¹⁵ Its scope to delegate its powers is limited by section 160(2) which provides that it may not delegate the passing of by-laws, the approval of budgets, the imposition of rates, levies and other taxes and the raising of loans. The section also provides that national legislation may provide criteria for determining the size of a council, whether councils may elect executive committees or other committees and the size of such committees.¹⁶ Section 160(7) provides that the council must conduct its business in an “open manner” and may only close sittings or those of its committees when it is “reasonable” to do so. Section 160(8) then provides

¹⁴ Section 160(1)(b).

¹⁵ Section 160(1)(c).

¹⁶ Section 160(5).

that members of a council are entitled to participate in “its committees” in a manner that—

- “(a) allows parties and interests reflected within the Council to be fairly represented;
- (b) is consistent with democracy; and
- (c) may be regulated by national legislation.”

This provision has two aspects worth emphasising: it entitles councillors (elected representatives of local communities) to participate in the proceedings of the council and its committees. This entitlement contains an important affirmation of representative government. Secondly, that entitlement is subject to three conditions – first a principle of fair representation – that parties and interests be fairly represented in the committees and at council; second, that the that principle of fair representation remains subject to democracy (which implies that the majority must always be able to determine decisions), and finally, that the manner in which the principle of fair representation is achieved may be regulated by national legislation.

[62] The provisions of section 160(8) must be read in the context of a history of separation and inequality which it is the task of local government to overcome. The section requires the involvement of councillors representing different parties and interests from the same town in a process of collegial decision-making. Councillors from different parties and communities will have to debate with one another the challenges facing local government. The process of reasoned debate and engagement ensures that interest groups and parties are fairly represented and can contribute to the

shared resolution of problems in a manner antithetical to our past but consistent with the process of transformation of local government over the last ten years.

[63] The involvement of councillors representing a range of parties and interests in the council and its committees is, in accordance with section 160(8)(b), always subject to the overarching dictates of democracy which require that majority parties determine decisions. But the obligation of fair representation means that those decisions are made only once the interests of non-majority parties have been aired. Moreover section 160(8)(c) makes it plain that the precise manner in which fair representation of interests and parties is achieved may be regulated by national legislation.¹⁷ The purpose of section 160(8) in the context of the need to transform our racially divided and deeply unequal towns and cities is an important one. It recognises the value of involving different parties and interests within each town and city in the process. It avoids recreating the separation of the past in order to facilitate a shared future.

[64] The appellants argue that section 160(8) governs all committees of the council including the mayoral committee. The respondents assert that the mayoral committee is not a committee contemplated by section 160(8) and point to the fact that the mayoral committee is appointed by the mayor and that members of it hold office at the pleasure of the mayor.¹⁸ This submission needs to be understood in the light of the fact that Chapter 7 contains no express provisions concerning the executive

¹⁷ An example of such regulation is to be found in section 43(2) of the Structures Act which provides that an executive committee must be composed in proportion to the members of the council.

¹⁸ See section 60(1) of the Structures Act.

institutions of local government. It states that the executive authority of local government resides in the municipal council and requires a council to elect a chairperson. The provisions of Chapter 7, therefore, constitute only the framework for local government¹⁹ and not comprehensive regulation of it. That regulation is to be completed by national legislation, and in some respects, by provincial legislation.

[65] The Constitution provides for three different categories of municipality²⁰ and requires national legislation to determine the types of municipality that may be established within each category.²¹ The Structures Act provides for different types of municipality and in particular provides for different types of executive systems – one of which is an executive system based on an executive mayor. It is this system which is in issue in this case.

The Structures Act

¹⁹ See Constitutional Principle XXIV, Schedule 4 to the Constitution of the Republic of South Africa Act 200 of 1993 which provided that:

“A framework for local government powers, functions and structures shall be set out in the Constitution. The comprehensive powers, functions and other features of local government shall be set out in parliamentary statutes or in provincial legislation or in both.”

See also the first certification judgment *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa*, 1996 1996 (4) SA 744 (CC); 1996 (10) BCLR 1253 (CC) at paras 299-302; and the certification of the amended text judgment *Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Amended Text of the Constitution of the Republic of South Africa*, 1996 1997 (2) SA 97 (CC); 1997 (1) BCLR 1 (CC) at paras 72-81.

²⁰ Section 155(1) provides for category A municipalities which have exclusive municipal executive and legislative authority within their areas; category B municipalities which share municipal executive and legislative authority with a category C municipality in their areas; and category C municipalities which have municipal executive and legislative authority within an area which has more than one municipality.

²¹ See section 155(2) of the Constitution.

[66] The powers of an executive mayor are set out in section 56 of the Structures Act. It is a hands-on job. The executive mayor must evaluate the needs of the municipality in order of priority and recommend strategies, programmes and services to the council to meet those needs.²² In addition to strategy and review, however, the mayor is also required to perform all duties and functions delegated by the municipal council²³ and oversee the provision of services to the community.²⁴ The mayor may also be required to perform a ceremonial role if required to do so by the council.²⁵

[67] If the municipal council has more than nine members, the Structures Act requires the mayor to appoint a mayoral committee from amongst the members of the council.²⁶ The mayor may also dismiss the members of the council²⁷ but otherwise the mayoral committee members remain in office for the term of the executive mayor.²⁸ The mayor has the power to delegate specific responsibilities and powers to each member of the mayoral committee.²⁹ Moreover, the municipal council may designate certain powers of the executive mayor to be exercised and performed by the executive mayor together with the members of the mayoral committee.³⁰

²² Section 56(2) of the Structures Act.

²³ Section 56(3)(f).

²⁴ Section 56(3)(e).

²⁵ Section 56(4).

²⁶ Section 60(1)(a).

²⁷ Section 60(1)(d).

²⁸ Section 60(4). If the mayor vacates office, the committee is dissolved (section 60(5)).

²⁹ Subsections 60(1)(b) and (c).

³⁰ Section 60(3).

[68] It is clear from this account that where the system of municipality adopted is that involving an executive mayor, the executive authority of the municipal council will often be concentrated in the executive mayor and the mayoral committee. The mayor is appointed by the municipal council for a maximum of two consecutive terms³¹ and may be removed by the municipal council during his or her period of office.³² The mayoral committee assists the mayor in the performance of his or her duties. But it is more than a committee of advisors for the mayor may delegate powers and functions to members of the committee and the municipality may designate certain tasks to the mayor which may only be exercised in concert with the members of the mayoral committee.

[69] The Structures Act also provides in section 80 for the appointment of committees of councillors to assist the executive mayor. It provides that the number of such committees may not exceed the number of members of the mayoral committee and that the executive mayor may appoint a chairperson for each of these committees from amongst the members of the mayoral committee. Furthermore, the mayor may delegate powers and duties to this committee.

Is the mayoral committee a committee of the council?

³¹ Section 57(1)(b).

³² Section 58.

[70] The respondents argued that because the mayoral committee is appointed by the mayor and holds office at his or her pleasure, it is a committee of the mayor and not of the council. The fact that the committee is appointed by the mayor cannot answer the question of whether the committee is one within the contemplation of section 160(8) or not. The Constitution does not contemplate in express terms executive mayors at all. Were the respondents' argument to be adopted, the important constitutional requirement entrenched in section 160(8) could be evaded by simply permitting the executive mayor to appoint all committees of the council. The answer to the question whether the mayoral committee is a committee within the contemplation of section 160(8) or not, cannot lie simply in the fact that it is not appointed by the council itself.

[71] Langa DCJ places reliance section 160(1)(c) of the Constitution which states that a municipal council "may elect an executive committee and others committees, subject to national legislation" and section 160(5) which refers to the election of committees by the council to conclude that when section 160(8) speaks of committees it is only speaking of those committees elected by the council. Once again, in my respectful view, this approach cannot be correct. The method of appointment of committees cannot be used to evade the constitutional purpose performed by section 160(8).

[72] As indicated above, section 160(8) serves the constitutional purpose of ensuring that where deliberative decisions are made by committees of councillors to exercise the executive and legislative authority of the council, the deliberation preceding the

decision-making involves the fair representation of different parties and interests. Such a deliberative process in the sphere of local government will involve different groups resident within the same town or city all embarking on the process of transformation of their town. Ensuring the consideration of a wider range of interests may well serve to deepen and legitimise democracy and may facilitate agreement about the manner in which transformation should take place. The fundamental constitutional purpose is to undo the separation, exclusion and inequality of the past by ensuring that there is shared involvement in deliberation subject, of course, to the right of the majority to make decisions.

[73] If this is the constitutional purpose at the heart of section 160(8), the method of appointment of the mayoral committee cannot be determinative of whether section 160(8) is of application or not. More important for answering that question will be the powers and functions of the mayoral committee. Is the mayoral committee involved in deliberative decision-making which involves the exercise of the powers of the municipal council? The mayoral committee and its members do exercise executive powers and functions on behalf of the municipal council. Those powers are conferred upon the mayoral committee by delegation, both by the mayor,³³ and by the municipal council itself.³⁴

³³ See subsections 60(1)(b) and (c).

³⁴ See section 60(3).

[74] It could be argued that because the mayoral committee is involved primarily with strategy and executive authority, section 160(8) should not apply to it because it is inappropriate that committees exercising executive authority be required to be fairly representative. In this regard, it should be noted that similar constitutional provisions govern the legislative committees of the national legislature and provincial legislatures,³⁵ but not provincial and national executive authority, as Langa DCJ observes.

[75] However, it does not follow that because such provisions apply to the national and provincial legislatures only and not to the executive authority in those spheres, a similar meaning should be given to section 160(8). Indeed the converse is true. As I have described, there are significant functional differences between the national and provincial spheres of government on the one hand, and the local sphere on the other. These differences have resulted in different constitutional structures and provisions for the different spheres. The Constitution contemplates expressly that executive and legislative authority should both vest in the same institution at local level, and there seems to be no reason why section 160(8) should not therefore apply to all the committees comprising municipal councillors who are engaged in the exercise of the

³⁵ See section 57(2):

“The rules and orders of the National Assembly must provide for—

-
 (b) the participation in the proceedings of the Assembly and its committees of minority parties represented in the Assembly, in a manner consistent with democracy;”.

See also section 70(2)(b) in respect of the National Council of Provinces and section 116(2)(b) in respect of provincial legislatures.

powers of municipal councils, whether the powers being exercised are legislative or executive.

[76] Langa DCJ suggests that requiring mayoral committees to be fairly representative will undermine the constitutional goal of efficient delivery of services. Efficient delivery of services is of key importance, but I am not persuaded that the approach I take will impair that goal. The Structures Act makes it clear that members of the mayoral committee hold office at the pleasure of the mayor and should efficiency be threatened by the attitude of one or more of the members of the mayoral committee, the mayor would be entitled to dismiss them. This permits the mayor to ensure that efficiency is not impaired.

[77] Furthermore, in determining whether the Constitution intended the provisions of section 160(8) to apply to committees concerned with exercising executive authority in the local sphere of government, it is important to bear in mind the nature of the tasks local government performs. Those tasks involve primarily municipal planning as well as the provision of services such as power, water, waste removal, municipal clinics and fire-fighting services and the provision of amenities such as sports grounds, parks, libraries, markets and municipal transport. Without doubt, these are important services and facilities relied upon by all members of the community. They are not areas of executive authority which require the confidentiality and political cohesion of an exclusive executive team modelled on the cabinet for national government.

[78] This conclusion constrains the choice available to the executive mayor in composing his or her mayoral committee, but it does not deprive the mayor of the power to dismiss members of the committee. Moreover, section 160(8)(b) is clear that the principle of fair representation is always subject to democracy and the will of the majority. Members of the mayoral committee must therefore submit to that principle, as must all councillors. The principle established by section 160(8) is a principle which requires inclusive deliberation prior to decision-making to enrich the quality of our democracy. It does not subvert the principle of democracy itself.

[79] I conclude then that the function of a committee is determinative at the end of the day as to whether section 160(8) applies or not. There is no reason to limit the ordinary meaning of the words of section 160(8) either to committees appointed by the municipal council itself, or to those committees engaged only with legislative matters. Accordingly, because the mayoral committee is a committee composed of councillors engaged upon exercising the executive authority of the municipal council, it is a committee of the council as contemplated by section 160(8). It would follow that if the members of the committee were limited to advising the mayor and had no executive authority of their own, the committee would not constitute a committee of the council but would be an advisory body holding office at the pleasure of the mayor solely to assist him or her.

[80] For these reasons, I cannot agree with Langa DCJ that the mayoral committees required by section 60 of the Structures Act are not committees within the contemplation of section 160(8) of the Constitution. The question that then arises is whether section 60 of the Structures Act is reasonably capable of being read in a manner consistent with the Constitution. There is no textual bar to reading section 60 subject to section 160(8), for it is silent on the composition of the committees. The only interpretive difficulty that arises is therefore contextual.

[81] I agree with Langa DCJ that there are indications in other provisions of the Structures Act which suggest that mayoral committees do not have to be composed according to a principle of fair representation. Perhaps the strongest such indication is the distinction drawn in the Act between the executive committee system and the executive mayor system. The former must be composed so as to ensure fair representation,³⁶ whereas the Act is silent in the case of the latter. Reading the mayoral committee provisions subject to a principle of fair representation therefore does run foul of ordinary principles of interpretation which would suggest that the specific inclusion of the principle of fair representation in relation to the one would mean the Act's silence on the other indicated an intention that such a principle is not applicable to it. It does seem to me, however, that this contextual difficulty is not insuperable, particularly in order to avoid a reading which would render the provision inconsistent with the Constitution.

³⁶ See section 43(2) of the Structures Act.

[82] In the circumstances, I conclude that the proper interpretation of section 60 requires that mayoral committees be composed to ensure fair representation as required by section 160(8) of the Constitution. This can be done in the manner proposed by section 43(2) of the Structures Act in relation to executive committees. Section 60 should therefore be read to require that groups and interests represented in the council be represented proportionally on the mayoral committee. Of course, should the legislature wish to regulate the requirement of fair representation in a different, but constitutionally acceptable, manner, it is clear from section 160(1)(c) of the Constitution that it is entitled to do so.

[83] For these reasons I would uphold the appeal.

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