



Speaking Notes: Public Protector Adv. Busisiwe Mkhwebane

SALGA Council of Mayors

June 8, 2017

City of Cape Town Chambers

Panel Debate: “Municipal Demarcation and its Impact on Good Governance and Municipal Sustainability”

Facilitator, Mr Vuyo Mvoko;

Deputy Minister of COGTA, Hon. Andries Nel;

Auditor-General, Mr. Kimi Makwetu;

Chairperson of the Municipal Demarcation Board, Ms Jane Thupana;

SALGA NEC Member, Cllr. Deon de Vos;

Distinguished guests;

Ladies and gentlemen;

INTRODUCTION

I would like to thank the South African Local Government Association (SALGA) for extending an invite to my office to take part in and, hopefully, make a meaningful contribution to this critical dialogue.

Let me also congratulate SALGA for this initiative. Skeptics might dismiss it as yet another talk shop but the truth is it is in these kinds of gatherings that real solutions to the problems dogging our democracy may be found.

This is a very pertinent and timely debate. It comes on the back of my four-month, nationwide roadshow, during which I heard first-hand from the people of South Africa as they related their daily struggles.

I heard heartrending stories from communities in Ratanda, Thohoyandou, Ermelo, Thaba Nchu, Madibogo, Ngilanyoni, Masiphumelele, Mqanduli and Ritchie.

These include cases such as the plight of the community of Masiphumelele here in the City of Cape Town, where people live in squalor, right next to a stinking drainage canal.

Not only is the canal a health hazard for residents, it does not have barriers along its banks, thereby posing a danger to the community as young children that play nearby could fall and drown in the drainage.

This community also finds itself having to live with the indignity of a block of individual communal toilets, some of which are not working, on the one side of their settlement.

In a society where women are under attack, with frequent murder and rape incidences, one can only imagine what goes through the minds of women in that community whenever they need to relieve themselves at night.

That case is among several across the country that my team and I have prioritized for intervention and is in line with my vision of making an impactful contribution in the lives of the people at the grassroots during the course of my tenure as the Public Protector.

Others include the plight of communities where traditional authorities and elected local government authorities are in disagreement over who has the power to allocate land for development purposes as well as the dilemma of farm dwellers who live in terror at the hands of oppressive farmers.

GOOD GOVERNANCE (central message)

You already know that the institution I head is established and empowered by the Constitution in sections 181 and 182 to strengthen constitutional

democracy through its investigation of, reporting on and remedying alleged and suspected improper conduct in all state affairs.

In a nutshell, the Public Protector exists to ensure that there is good governance in all state affairs. This includes the local government sphere.

Good governance is the lifeblood of our democracy. The Constitution, in its preamble, promises the people of South Africa an improved quality of life and a freed potential of each person.

It recognizes that, for the overwhelming majority of our people, the quality of life in the pre-1994 dispensation was appalling and socioeconomic opportunities were a preserve of one section of the populace and that this needs to be corrected.

In addition to the promise in the preamble, the rights and freedoms enshrined under Chapter 2 of the Constitution, in the Bill of Rights, spell out the entitlements of all the people of this country.

These include the rights to equality; human dignity; housing; healthcare, food, water and social security; and education.

All these and more seek to reverse the imbalances of the past and level the playing field between the previously advantaged and the historically marginalized.

These promises are premised on the understanding that those elected and appointed to positions of authority and of service in the public sector will exercise their powers and execute their functions within the confines of the dictates of principles of good governance.

But **what is good governance?** According to the United Nations, governance involves “the process of decision-making and the process by which decisions are implemented (or not implemented)”.

The Good Governance Guide, an online tool produced by the Municipal Association of Victoria to promote good governance in local government, the following are among characteristics of good governance:

- a) **The rule of law** – decisions must be consistent with the Constitution and the law and within the powers of those making them;

- b) **Accountability** – decision-makers must understand that they need to report on, explain and be answerable for the consequences of their decisions;
- c) **Transparency** – people should be able to follow and understand the decision-making process and its implications;
- d) **Responsiveness** – decisions must serve the needs of the people while being timely and appropriate;
- e) **Participation** – those affected must have the opportunity to participate in the decision-making process; and
- f) **Effectiveness and efficiency** – decisions must involve the best use of available resources (people, money and time) for best possible results

We can therefore conclude that, good governance is essentially about our conduct as decision-makers in the public sector in respect of our management of public resources in so far as our public mandates are concerned.

And so, as the Public Protector, my wish is for all in state affairs, including municipalities to embrace these principles when taking decisions.

In other words, to keep the Public Protector away, you need to do your work in accordance with these principles. Failure to do so might earn you a visit from me and my team.

LOCAL GOVERNMENT

As the cliché goes “local government is at the coal face of service delivery.” This is a very important point to make because it is true that the majority of our people come into contact with government and its services at municipal level.

This is why service delivery protests tend to occur at and are targeted at local authorities. More often than not, grievances are about matters that are the competency of local government or where municipalities have a role to play such as the provision of water, housing, roads, sanitation and electricity.

The Constitution in section 152(1) lists the following as the objects of local government:

- 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 organs in the matter of local government.**

Subsection (2) enjoins municipalities to “**strive, within [their] financial and administrative [capacities], to achieve the objects set out in subsection (1)**”.

In addition to the above, section 153(a) of the Constitution, commands municipalities to “**structure and manage [their] administration and budgeting and planning processes to give priority to the basic needs of the [communities] and to promote the social and economic development of the [communities]**”.

My office receives a lot of complaints implicating local government. In actual fact, complaints against municipalities account for a lion’s share of our total workload in 2015/16 just like it was the case in the preceding year.

In 2015/16, my office dealt with 1 443 complaints concerning various municipalities across the country. In the preceding year, there were 2 456 complaints against municipalities.

The complaints are spread throughout our offices, with the National Office, Gauteng, Western Cape and Eastern Cape receiving the bulk of the matters.

My office deals with a number of investigations in relation to the delivery of infrastructure such as roads, public facilities and housing. The key challenges here are the delivery of shoddy workmanship, with impunity and false billing. Procurement processes associated with public infrastructure delivery remain a cause for concern. Cases involving service delivery failures include issues such as:

- a) Poor services or failure to rectify defective services/ failure to repair (especially in respect of housing and property);
- b) Lack of service delivery, No sanitation, proper roads, water and electricity.

- c) Non –payment or delayed payment by the State to service providers;
- d) Unresponsiveness of municipalities to complaints and grievances regarding service delivery;
- e) Failure by the State to rectify bona fide mistakes (eg, incorrect billing)
- f) Failure to attend to damages caused by faulty state equipment and infrastructure failure (drainage, flooding, electrical surges);

Approximately a third of the cases under investigation deal with improper conduct, - “conduct failure” (as opposed to service failure), and a significant portion of such conduct failure cases relate to procurement activities at local government level.

The complaints and enquiries vary in nature and covers virtually all aspects of the procurement process; from the decision to go out on tender or not, the tender advertisement, the submission and acceptance of tender documents, the adjudication process, the award of the tender and communication of decisions, as well as the cancellation of contracts.

Over the last 5 years the Public Protector has issued no less than 24 formal investigation reports on procurement related investigations. Some of these involved municipalities.

MUNICIPAL DEMARCATION

The Municipal Demarcation Board is a creature of statute that has its roots in the Constitution. Section 155(3)(b) of the Constitution provides that “national legislation must establish criteria and procedures for the determination of municipal boundaries by an independent authority.”

The national legislation in this instance is the Local Government: Municipal Demarcation Act, 1998, section 3 of which provides that the Board is a juristic person, is independent and must be in partial and perform its functions without fear, favour or prejudice.

Section 4 provides that the Board must determine municipal boundaries in accordance with the Act and other appropriate legislation enacted in terms of Chapter 7 of the Constitution, and must render an advisory service in respect of matters provided for in the Act and other appropriate legislation.

In addition, section 24 of the Act provides that in the performance of its functions, the Board must take into account, amongst other things, the

financial viability and administrative capacity of municipalities to perform municipal functions effectively and efficiently.

This and the characteristics of good governance that I referred to earlier are, in my view, very critical. This is especially the case when one looks at what has happened in Vuwani, Limpopo, where people have set dozens of schools alight and boycotted the last local government elections in protest against the decision of the board.

We know there are other cases in the pipeline which will have to be executed with utmost care, in line with the law and the principles of good governance and the lessons we have learned from the likes of Vuwani.

One such case is that of the people of Matatiele in the Eastern Cape. We know that there are those that want the Matatiele Local Municipality to be returned into the fold of KwaZulu-Natal, where it originally belonged while others prefer that the status quo be maintained.

Minister Des van Rooyen will recall that in 2005/06, during his tenure as the Executive Mayor of Merafong Local Municipality, there was a protracted struggle by the community of Khutsong, who insisted on the reorganization of the boundary that separated Gauteng and the North West provinces.

Initially on the North West side of the boundary, the community insisted on belonging to Gauteng. At the core of their argument was the view that, in Gauteng, they stood a better chance of receiving quality services.

It is now a matter of historical record that, in the end, the people of Khutsong got what they wanted. However, the message that came to the fore in that instance was that, the standard and quality of services differ from one province to the next.

Although this kind of reasoning is difficult to understand when one takes into cognizance the fact that both Gauteng and the North West were under the same government, which also governed the entire country, there have been instances that have given rise to such perceptions.

For example, one of the complaints that came out prominently during a systemic investigation into problems plaguing the RDP housing programme was that houses built in a particular province were of better quality, structure and design than those constructed in other provinces.

Similar perceptions could have easily become a driving force behind the kind of violence and destructive protests such as to those witnessed in Khutsong and, in Vuwani.

This begs the question: Shouldn't there be a standardized specification that is used by all contractors across provincial and municipal boundaries to deliver quality houses?

Perhaps the department responsible for provincial and local government, being COGTA, needs to work closely with its stakeholders, including provincial Departments of Cooperative Governance and institutions such as SALGA to find ways of standardizing services across the board.

This and other interventions will ensure that people see government as one and that one jurisdiction is not seen as better than the other, especially when the jurisdiction concerned are under the government of the same political organization.

MUNICIPAL SUSTAINABILITY

For municipalities to deliver on their mandate, they need resources. But the funding model of municipalities is different from that of a typical government department.

While departments are fully funded from the fiscus, municipalities only get partial allocations with the understanding that they will, on their own, raise the rest of the revenue they require to run their affairs and deliver services.

There are two main funding streams for local government. The one involves the raising of own revenue through property taxes, service fees and fines. In terms of section 229 of the Constitution, a municipality may impose these rates and fees. The other funding stream involves allocations received from government, which are made possible by section 227 of the Constitution.

There is also the Municipal Infrastructure Grant, a transfer that is managed by the Department of Cooperative Governance and Traditional Affairs, with a view to addressing infrastructure backlogs in the provision of basic services such as water, sanitation and roads, among other things.

This brings me to the question of **municipal sustainability**. For me, this, in the main, talks to the whole issue of financial viability of municipalities

because, as already indicated, municipalities must be well resourced in order to deliver on their mandate.

I came across at least three definitions of financial viability in the comprehensive report prepared by the Financial and Fiscal Commission and presented at the Municipal Demarcation Board Conference on Demarcation and Spatial Transformation.

The first definition is by the National Treasury, the second is by the Local Government Fiscal Framework and the third and last is by COGTA.

The National Treasury says financial viability means “the sustainability of the municipal budget, and whether the municipality is able to sustainably meet its expenditure commitments from its own revenues and transfers”.

According to the Local Government Fiscal Framework, financial viability refers to “the state of balancing revenue sources and expenditure responsibilities and if these two aspects balance then the municipality is financially viable”.

COGTA on the other hand defines financial viability in terms of self-sufficiency or self-reliance.

It is clear from all these definitions that viability or sustainability has to do with a municipality’s ability to deliver on its mandate, which includes having the financial muscle to do so.

In other words, a municipality that does not have the requisite funds may not be able to meet the constitutional and voters’ mandate.

But linked to adequate funding is proper **financial management** and having **qualified, experienced, disciplined, ethical and courageous financial managers in strategic positions such as Municipal Managers and Chief Financial Officers**, amongst others.

Year in, year out, the Auditor-General paints a gloomy picture of the state of financial management at local government level. A key contributor has been poorly skilled financial managers and outright improper conduct. These have resulted in a situation where funds meant to bring about development and quality services to our people found the way into other things, including corruption.

This is a risk for municipal sustainability because when there isn't enough resources for a municipality to meet its expenditure commitments or balance its revenue resources and expenditure responsibilities, its viability and sustainability may be suspect. The municipality concerned may also find itself having to face an angry community.

CONCLUSION

In summary, the following will, in my view, ensure successful demarcations and sustainable municipalities.

- Good governance, taking into account all its characteristics as indicated earlier, must be the order of the day and must be the cornerstone of all decision-making processes in all state affairs.
- Municipalities need to be adequately funded. They must also be in a position to raise revenue on their own.
- In arriving at decisions regarding demarcations, the Municipal Demarcation Board needs to ascertain, as provided for in legislation, the sustainability of affected municipalities as determined by funding from both allocations/transfers and self-raised revenue.
- Once they have acquired the necessary resources, municipalities must observe good governance principles in implementing their mandate.
- Municipalities must ensure good financial management, including recruiting to strategic positions such as Municipal Managers and Chief Financial Officers suited persons.

Lastly, congratulations to SALGA once again on this noble initiative. I wish you all of the best and I trust that by the end of tomorrow's session, you would have realised all that you set out to achieve.

Thank you.

Adv. Busisiwe Mkhwebane
Public Protector of South Africa

