

SANEF MUNICIPAL ELECTIONS TRAINING MODULES 2021

2021
MUNICIPAL ELECTIONS

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Prepared with the assistance of Mary Papayya, Izak Minaar, Hopewell Radebe, Reg Rumney, Khomotso Letsatsi, and ALT Advisory
<https://altadvisory.africa/>

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This module is part of a comprehensive set of online election resources which will be updated from time to time in the run-up to the 2021 elections. For further information on the 2021 elections, please visit
<https://elections.saneef.org.za>

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MODULE I
HOW THE ELECTIONS
WORK
2021
MUNICIPAL ELECTIONS



MODULE I | ELECTIONS 2021: HOW THE ELECTIONS WORK

Overview of this module:

- The constitutional rights of voters, and the constitutional and legislative framework applicable to elections;
- The role and functions of key electoral institutions such as the Independent Electoral Commission (IEC) and Electoral Court;
- How the mixed-voting system of proportional representation (PR) and first-past-the-post (FPTP) (ward candidates) works in South Africa;
- What the key milestones of the Election Timetable are during an election period.

1. The constitutional framework

Democracy is a fundamental and indispensable principle of government in South Africa. The preamble to the South African Constitution states that government must be based on the “will of the people”, and section 1 sets out the values on which South Africa is founded, which includes universal adult suffrage, a national common voters’ roll, regular elections, and a multi-party system of democratic government.

In an open and democratic society, citizens express their will through elections. Elections are based on — and must be conducted in accordance with — the above democratic values. Political rights are particularly important given South Africa’s history in which the majority of its citizens were denied the right to vote.¹

Chapter 2 (Bill of Rights), section 19 of the Constitution provides:

- “(1) Every citizen is free to make political choices, which includes the right—
- (a) to form a political party;
 - (b) to participate in the activities of, or recruit members for, a political party; and
 - (c) to campaign for a political party or cause.
- (2) Every citizen has the right to free, fair, and regular elections for any legislative body established in terms of the Constitution.
- (3) Every adult citizen has the right—
- (a) to vote in elections for any legislative body established in terms of the Constitution, and to do so in secret; and
 - (b) to stand for public office and, if elected, to hold office.”

These rights and values are safeguarded by a number of civil and political rights in the Constitution. For example, the right to freedom of expression, contained in chapter 2 (Bill of Rights), section 16 of the Constitution, includes the right to receive and impart information, which can ensure that voters can make informed choices and hold political representatives to account. These rights also include an express protection of media freedom, which is integral to a democratic society.

The exercise of these rights enables citizen involvement in government through a democratic process that is representative, participatory, and direct. However, no right is absolute. Chapter 2 (Bill of Rights), section 36 of the Constitution provides for certain stipulations that the limitation of any right must comply with to be justifiable. These stipulations include that a right may only be limited in terms of a law of general application — that is, that applies to the general population — and to the extent that it is reasonable and justifiable in an open and democratic society.

¹ See *Ramakatsa and Others v Magashule and Others* [2012] ZACC 31 at para 64.

WHAT RIGHTS DO VOTERS ENJOY?

Chapter 2, section 19, read with section 1(d) of Chapter 1 of the Constitution, facilitates both the representative and participatory elements of democracy. According to the IEC, the key rights that each voter enjoys include:²

- The right to free and fair elections;
- The right to vote;
- The right not to vote;
- The right to spoil one's vote;
- The right to vote once at one's registered voting station;
- The right to one's own free choice of party or candidate;
- The right to a secret vote;
- The right to get help to vote;
- The right to vote safely;
- The right to make a complaint about harassment or intimidation.

2. The legislative framework

Several laws apply during the elections. First, the **Electoral Commission Act 51 of 1996** expands on the establishment of the IEC and details its composition, administrative structure, power, duties, and functions.

Second, the **Electoral Act 73 of 1998** (Electoral Act), as amended, is the primary piece of legislation relevant to national and provincial elections in South Africa. It provides for the various operational and administrative aspects relevant to elections, including the registration of voters and the voters' roll, the accreditation of observers, and the determination and declaration of final results. Part I of Chapter 7 of the Electoral Act sets out what conduct is prohibited in terms of the legislation. This is dealt with in more detail below.

The **Local Government: Municipal Electoral Act 27 of 2000** (Municipal Electoral Act), as amended, regulates the specific processes for municipal elections in South Africa. The Act was amended in 2010 and again in 2016 to provide for new technologies, such as smart IDs and electronic payments, and other changes. The Municipal Electoral Act states that the Electoral Act only applies to municipal elections to the extent stated in the Municipal Electoral Act. In other words, the Municipal Electoral Act should be deemed to take precedence over the Electoral Act when it expressly deals with a particular issue related to municipal elections.

These laws have recently been updated by the **Electoral Laws Amendment Act 1 of 2019**, which came into effect on 6 March 2019.³ It makes key changes to the Electoral Commission Act, the Electoral Act, and the Municipal Electoral Act. For instance, it clarifies that the voter's roll to be used in an election must be certified by the chief electoral officer for that election; it repeals the requirement that the identity document of a voter must be stamped as proof of voting; it provides for a different voting procedure for voters without addresses on the voter's roll; and it limits the class of persons who may apply for accreditation to provide voter education for an election to juristic persons.

Finally, there is the **Electoral Code of Conduct** (Electoral Code), which is contained in Schedule 1 of the Local Government: Municipal Electoral Act. The Electoral Code binds every party and candidate contesting an election. The Electoral Code is aimed at promoting conditions conducive to free and fair elections, in which there is a climate of tolerance, free political campaigning, and open public debate.

² IEC, 'Municipal elections handbook', (2016) at pp 51-52 (accessible [here](#)).

³ IEC, 'Commencement of Electoral Laws Amendment Act and Revision of Election Timetable (accessible [here](#)).

WHAT DOES THE ELECTORAL CODE REQUIRE FROM PARTIES AND CANDIDATES?

Parties or candidates must:⁴

- Publicly state that everyone has the right to freely express, challenge, or debate their political beliefs and opinions, to publish election materials, support candidates or parties, or recruit members for a party.
- Publicly condemn any action that may undermine the free and fair conduct of elections.
- Respect and facilitate the right of women to participate in electoral and political activities.
- Refrain from using language or acting in a way that may provoke violence during an election or the intimidation of parties, candidates, or voters, publish false or defamatory allegations, or discriminate on protected grounds.
- Refrain from unreasonably preventing any person access to voters.
- Refrain from defacing or unlawfully removing election materials of parties or candidates.
- Communicate and liaise with other political parties about planned political events.
- Recognise the authority of the IEC, assure voters of its impartiality, and obey lawful orders of the IEC.
- Work with IEC structures and allow them to perform their duties.
- Respect the role of the media.
- Accept the results of the election or challenge the result in court.

Notably, section 2 of the Electoral Code states that every contesting party and candidate must promote the purpose of the Electoral Code, publicise it widely in election campaigns, and promote and support efforts to educate voters. The specific provisions of these laws concerning the media are dealt with in more detail in Module II.

The **Political Party Funding Act 6 of 2018**, which was signed into law on 22 January 2019, is also relevant. It contains a wide range of accountability measures, including a requirement for the disclosure of donations above a prescribed threshold. The Act came into effect from 1 April 2021, in time for the 2021 municipal elections.

Sections 2 to 3 of the Political Party Funding Act establishes two political party funds: (i) the Represented Political Party Fund to enhance multiparty democracy by providing for the funding of represented political parties through funds appropriated by legislation; and (ii) the Multi-Party Democracy Fund for the purpose of funding represented political parties from private sources. The Political Party Funding Act imposes a wide range of accountability measures, including a prohibition on certain donations made directly to political parties, such as funds from foreign governments or foreign government agencies (section 8); and it requires the disclosure of donations above a prescribed threshold (section 9). The Political Party Funding Act has repealed the Public Funding of Represented Political Parties Act 104 of 1997.

Finally, it is also worth noting the 2020 Constitutional Court ruling in *New Nation Movement NPC v President of the Republic of South Africa & Others* that found parts of the Electoral Act unconstitutional in so far as it required candidates to be elected to the National Assembly and Provincial Legislatures only through their membership of political parties, and not as independent candidates.⁵ Parliament was given two years to rectify the legislation to allow for independent candidates to stand for office in national and provincial elections – as currently witnessed in municipal elections.

3. The role of the IEC

The Constitution lists the IEC under Chapter 9 as a state institution supporting democracy. Section 181(2) of the Constitution provides that Chapter 9 institutions are independent, subject only to the Constitution and the law, and that they must be impartial and exercise their powers and functions without fear, favour, or prejudice.

⁴ Schedule 1 of the Local Government: Municipal Electoral Act.

⁵ *New Nation Movement NPC v President of the Republic of South Africa & Others* [2020] ZACC 11.

The IEC consists of five members — one of whom must be a judge — each appointed by the President for a term of seven years.⁶

MEMBERS OF THE IEC FOR THE 2021 MUNICIPAL ELECTIONS

The five members of the IEC for the 2021 Municipal Elections are as follows: Mr Glen Mashinini (Chairperson); Ms Janet Love (Vice-Chairperson); Dr Nomsa Masuku (Commissioner); Mr Mosotho Moepya (Commissioner); and Judge Dhaya Pillay (Commissioner). The Chief Electoral Officer is Mr Sy Mamabolo.

The IEC, through the Office of the Chief Electoral Officer, has three main functions as set out in the Constitution,⁷ including to manage the elections of national, provincial, and municipal legislative bodies, and ensure they are free and fair, to declare results, and to compile and maintain a voters' roll.⁸ A national common voters' roll was first used in the 1999 general elections; and for every subsequent election (general and municipal) thereafter. According to section 5(2) of the Municipal Electoral Act, a municipality's segment of the voters' roll consists of the segments of the voters' roll for the voting district that fall within the municipality.

4. The Electoral Court

The Electoral Court is established in terms of section 18 of the Electoral Commission Act and enjoys the same status as that of a Supreme Court. The role of the Electoral Court is to review the decisions of the IEC relating to an electoral matter, and to hear appeals and reviews of decisions made by the Commission.⁹ All matters must be conducted on an urgent basis and disposed of as expeditiously as possible.¹⁰

The Electoral Court is also empowered to determine any matter that relates to the interpretation of a law referred to it by the IEC,¹¹ and to investigate any allegation of misconduct, incapacity, or incompetence of a member of the Commission and accordingly to make a recommendation to the National Assembly.¹²

For instance, in the decision of *Kham and Others v Electoral Commission and Another*, the Constitutional Court noted that:¹³

“The jurisdiction to review any decision of the IEC relating to an electoral matter affords the Electoral Court a power of judicial oversight over the activities of the IEC. The Electoral Court can examine any decision by the IEC and substitute it with its own. The range of electoral matters may be great. Certainly all the issues arising in the present case relate to electoral matters. They concern who may vote and whether all those who voted were entitled to do so.”

Members sitting on the Electoral Court are appointed by the President, on the recommendation of the Judicial Services Commission (JSC).

5. The voting system

Municipal elections take place in South Africa every five years and constitute the most basic formal level of democratically elected government in South Africa. Municipal elections differ from national and provincial elections in that they use a mixed or hybrid system of both a proportional representation (PR) system and ward system.¹⁴

⁶ Sections 6(1) and 7(1) of the Electoral Commission Act.

⁷ Section 190(1) of the Constitution.

⁸ As set out in section 5(1) of the Electoral Commission Act.

⁹ The powers, duties, and functions of the Electoral Court are set out in section 20 of the Electoral Commission Act.

¹⁰ Section 20(1) of the Electoral Commission Act.

¹¹ Section 20(6) of the Electoral Commission Act.

¹² Section 20(7) of the Electoral Commission Act.

¹³ [2015] ZACC 37 at para 42.

¹⁴ IEC, 'Election Types,' (accessible [here](#)).

There are three types of municipal councils in South Africa which hold executive and legislative authority, namely:¹⁵

1. Metropolitan councils (also known as Category A):

Metropolitan councils exist in cities that have high population density and high levels of economic activity,¹⁶ of which there are currently eight in South Africa: Cape Town, eThekweni (Durban), Johannesburg, Mangaung (Bloemfontein), Tshwane (Pretoria), Nelson Mandela Bay (Gqeberha, formerly known as Port Elizabeth), Buffalo City (East London), and Ekurhuleni (East Rand).

These municipalities are broken into wards, for which ward councillors are elected. Half of the ward councillors in metropolitan councils are elected through the proportional representation system through parties, and the other half are directly elected by residents (and may be independent or nominated by a political party).¹⁷ At the time of the 2016 municipal elections, South Africa's eight metros boasted 1478 seats in combination: 740 ward and 738 PR seats.

2. Local councils (also known as Category B):

Areas that do not fall within metropolitan municipalities are divided into local municipalities. Currently, there are 205 local councils nationwide. Each local council is further divided into different wards. After the 2016 municipal elections, demarcation changes came into effect that reduced the number of local municipalities in the country from 226 to 205. While in the past there was a differentiation between urban and local urban government, this is no longer the case and now all rural villages and farms fall under local municipalities.¹⁸

3. District councils (also known as Category C):

Multiple local municipalities make up a district municipality. South Africa currently boasts 44 district municipalities across nine provinces.

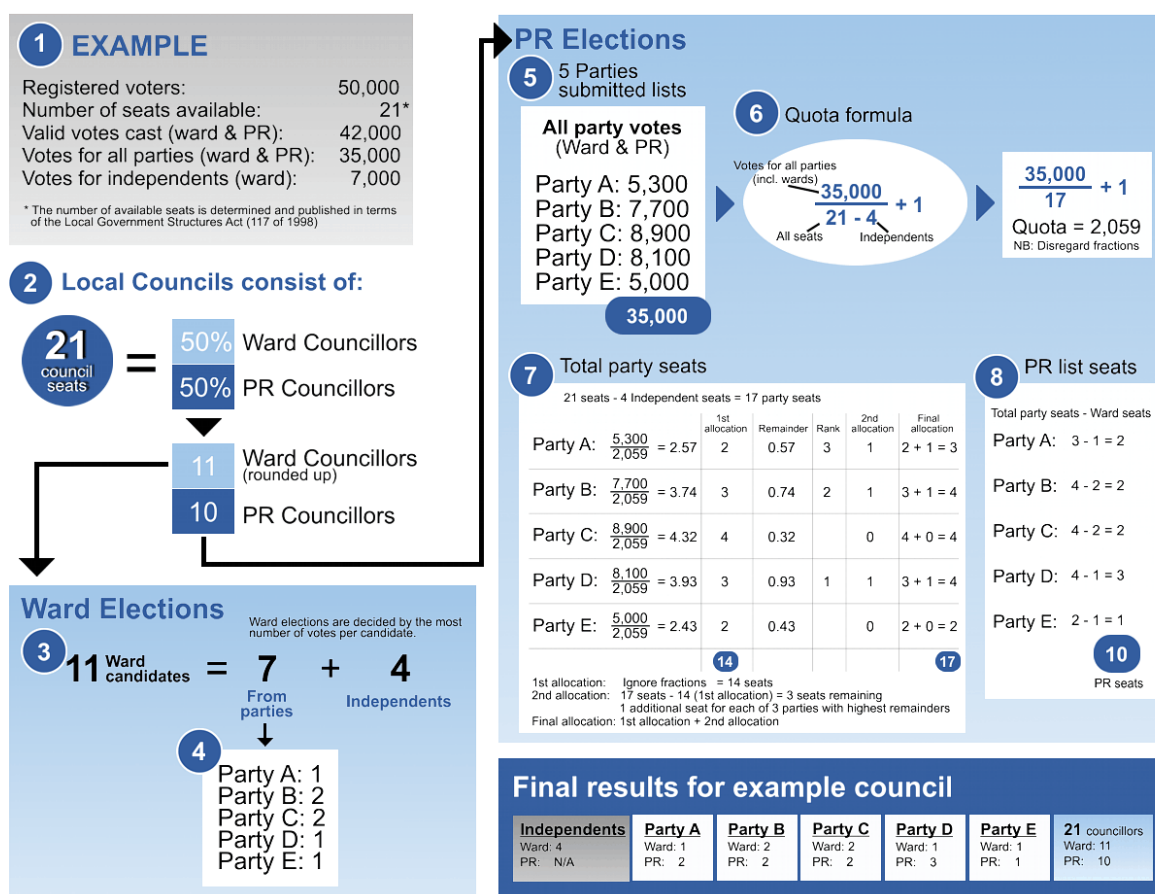
¹⁵ Municipalities.co.za, 'The Local Government Handbook South Africa 2021,' p 12 (accessible [here](#)).

¹⁶ Section 2 of the Local Government: Municipal Structures Act 117 of 1998.

¹⁷ Dullah Omar Institute, 'Electing Councillors: A Guide to Municipal Elections,' (2016) (accessible [here](#)).

¹⁸ IEC, 'Municipal elections handbook', (2016) at p 21 (accessible [here](#)).

Seat Allocation for Metro and Local Councils



The calculations for seat allocation are described in Schedule 1 of the Local Government Structures Act (117 of 1998)

Source: IEC, 'Seat calculation for Metro and Local Councils', accessible [here](#).

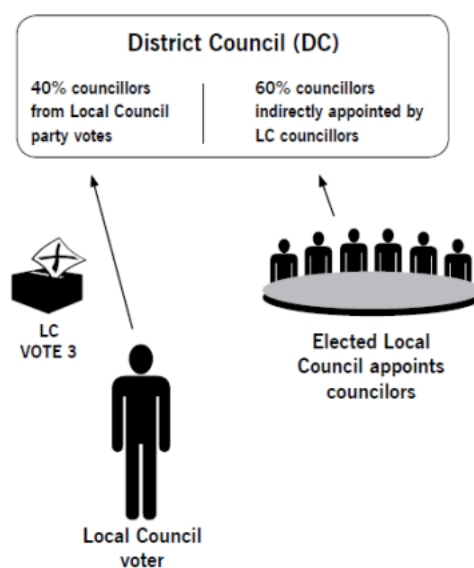
Municipal councils use a mixed system to elect councillors, incorporating both proportional representation (like the national elections), and a ward constituency system.

For both metropolitan and local councils, half of all seats on the council are allocated to proportional representation and half to ward candidates. This means that each voter in one of these municipalities votes once for a party, who is then allocated seats proportional to the percentage of votes that they receive, seats which the party fills from a closed list of candidates. The voter also then votes for an individual from a list of ward candidates, who may be representatives of parties or independent candidates, and from which the individual with the highest number of votes is elected.

A unique element of the mixed system is how the PR vote impacts the overall seat calculation. Even when a smaller party/organisation does not win a ward, those 'lost' votes are not discarded but added to that party/organisation's total votes to possibly give it a PR seat. This was one of the ANC's main criticisms of the electoral system after the 2016 local elections where, although the party had won more wards than other parties, its PR seat tally was restricted through the IEC's complex seat-allocation formula. In some instances, some smaller parties/organisations went on to assume the role of kingmaker in smaller councils due to a single PR seat allocation. Often, this kingmaker status afforded these smaller players more leverage in the form of demanding official positions such as that of the mayor, deputy mayor and council speaker posts as a bargaining tool.

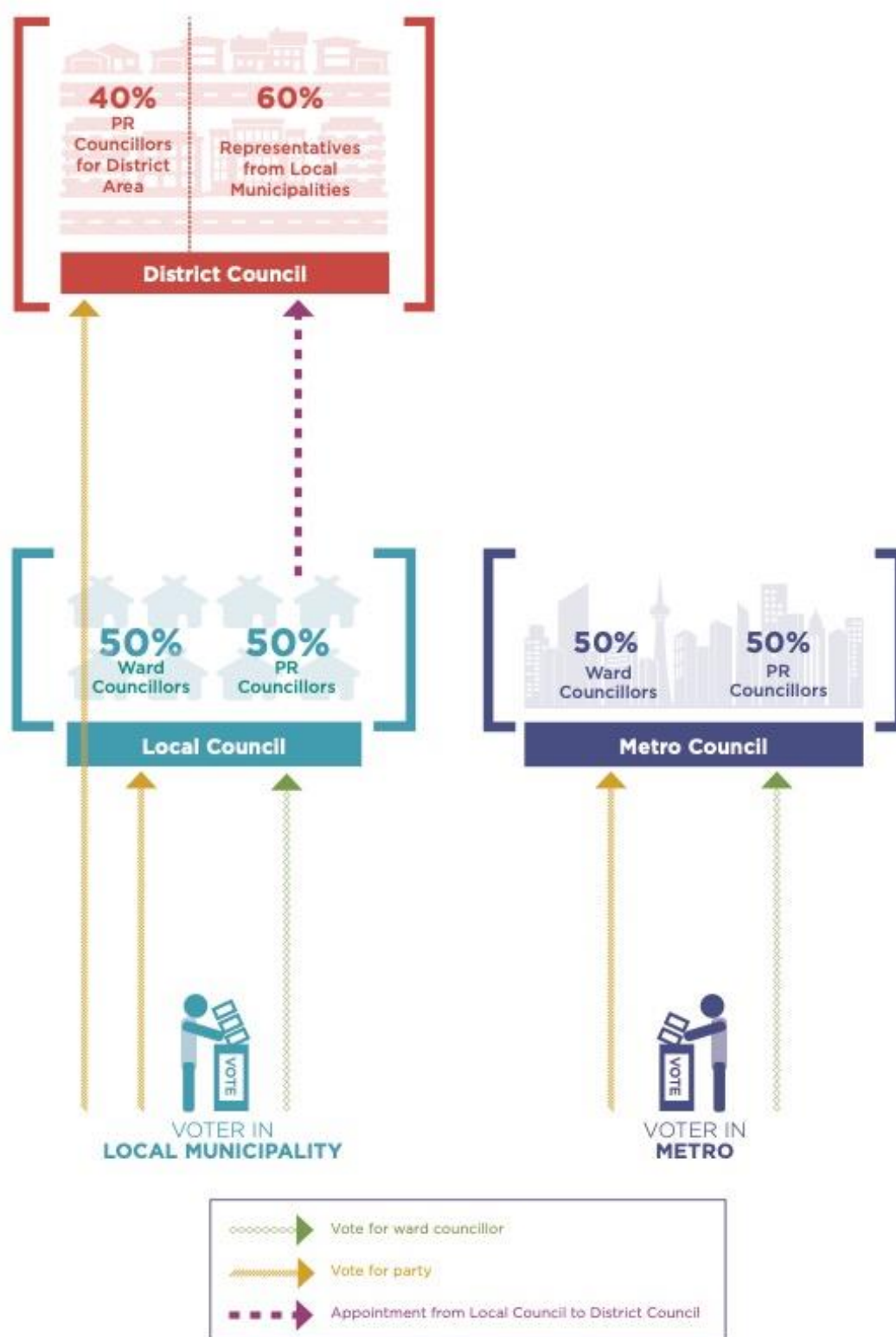
District councils operate slightly differently because they are made up of multiple local municipalities. Each voter in a local municipality also receives a district municipality ballot, from which they vote for parties according to the proportional representation system. 40% of the seats on the district council are allocated this way. The remaining 60% are allocated to

councillors sent by the local councils that make up that district, according to the proportion of support that parties have in a specific council.



Source: IEC, 'Seat allocation for District Councils, accessible [here](#).

Section 157 of the Constitution mandates the composition and election of municipal councils. It requires that a person may vote in a municipality only if they are registered on that municipality's segment of the national common voters' roll. This means that, unlike national elections, South Africans living outside the country may not vote in local elections. Likewise, prisoners also cannot vote in local elections because registered voters need to be resident where they are registered; and their names have to appear on that segment of the voting district voter's roll.



Source: Dullah Omar Institute, 'Electing Councillors: A Guide to Municipal Elections, accessible [here](#).

The process for establishing ward and voting district boundaries is a complicated one that is managed collaboratively by various agencies.¹⁹ First, the Minister of Cooperative Governance and Traditional Affairs (COGTA) defines the formulas for determining the number of councillors for each municipal council. The provincial Members of Executive Councils (MECs) then apply the formula to determine the number of municipal council seats for each municipality in their province, which is published in the *Government Gazette*. The Municipal Demarcation Board (MDB) then steps in. The MDB is an independent body established by the Constitution and the **Municipal Demarcation Act 27 of 1998** to draw municipal (known as demarcation) and ward (known as delimitation) boundaries. After an extensive nationwide public participation programme to inform their work, the MDB hands over final wards to the IEC prior to the election.

It is also worth noting that municipal by-elections take place in between regular elections. These must be held within 90 days after a municipal ward council seat becomes vacant due to death, expulsion, or resignation of a ward councillor.²⁰

6. Key milestones during the election period

To be eligible to vote, citizens must register to vote. To register, a person must be a South African citizen, 18 years old on the date on which the election was proclaimed by the President, have a valid green barcoded ID book, smart-card ID, or temporary ID certificate, and be registered on the roll.²¹ The voters' roll closes at midnight on the day of proclamation, and must then be made publicly available after certification by the IEC.²²

To contest an election, registered political parties and independent (ward) candidates must pay a deposit for each election that they want to contest, and parties must have submitted candidate lists to the IEC.²³ To be registered, a political party must submit the name of the party, the party's symbol in colour, the party's abbreviation, and the party's constitution. Failure to satisfy any one of these requirements may result in a refusal of registration. For example, after the establishment of the Congress of the People (COPE) in 2008, the ANC objected on the basis that COPE's name was closely associated with the ANC's own liberation history. COPE was allowed to keep its name following a court ruling that the 1955 Congress of the People in Kliptown was not the exclusive preserve of the ANC and its history.²⁴

The election date must be proclaimed — in other words, published in the *Government Gazette* — after consultation with the IEC, which is required to compile and publish an election timetable.²⁵

On the night of 21 April 2021, President Cyril Ramaphosa announced 27 October 2021 as the date for South Africa's sixth municipal elections.²⁶ Once the IEC concludes its voter registration drives to get more people registered for the election, notably previously unregistered and/or new voters, the minister of Co-operative Governance and Traditional Affairs (COGTA) is usually the person tasked with proclaiming and gazetting the official election date; and facilitating the closure of the voters' roll at midnight. Once that happens, the Election Timetable of key election milestones is set into motion. These milestones include:

- 1 Proclamation and gazetting of the election date
- 2 Closing of voters' roll at midnight following the proclamation
- 3 Release of proposed voting station addresses for inspection
- 4 Certification and publication of voters' roll
- 5 Deadline for submission of candidate lists and deposits
- 6 Notifying parties/candidates on document/deposit non-compliance
- 7 Final compliance deadline for parties and candidates
- 8 Publication of list of parties and candidates for elections
- 9 Applications for special votes²⁷

¹⁹ IEC, 'Municipal elections handbook,' (2016) at p 23 (accessible [here](#)).

²⁰ IEC, 'Frequently asked questions: Elections,' (accessible [here](#)).

²¹ Sections 6 and 7 of the Electoral Act.

²² Section 16 of the Electoral Act.

²³ Sections 14 and 727 of the Municipal Electoral Act.

²⁴ *African National Congress v Congress of the People (Association Inc. Under Section 21) and Others* [2008] ZAGPHC 411 (accessible [here](#)).

²⁵ Section 11 of the Municipal Electoral Act. The election timetable includes, for instance, the cut-off date for objections to the voters' roll; the deadline for the certification of the voters' roll; and the closing date for applications for special votes.

²⁶ BusinessTech, 'Ramaphosa sets the date for the 2021 local government elections' (22 April 2021) (accessible [here](#)).

²⁷ By law, a person can apply for a special vote if they are unable to travel to a voting station for health reasons, or are unable to access their voting station on voting day. Applying for a special vote enables a voter to vote on a predetermined day prior to Election Day, or to be visited by election officials at their home to vote. For more see, pp 49-51 of the IEC, 'Municipal elections handbook' (2016) (accessible [here](#)).

- 10 Publication of voting stations and mobile voting station routes
- 11 Issuing of participation certificates to parties and ward candidates, (including independent candidates)
- 12 Special voting days (usually spread over two days) from 8am to 5pm
- 13 **Election Day, 27 October 2021**

(i) Voting procedures

HOW DOES VOTING TAKE PLACE?

Voting takes place as follows:²⁸

- The voter produces an identity document or smart identity card to a presiding officer or voting officer²⁹ who verifies that the voter's name appears on the certified segment of the voters' roll of the relevant voting district³⁰ and that the voter has not already voted in that election.³¹
- The presiding officer records that the voter has voted, marks the hand of the voter, and stamps the back of the ballot paper with the official stamp for the election.
- The voter receives the ballot papers for the municipal elections from the presiding officer.
- The voter must enter an empty voting compartment, mark the ballot papers in a way that indicates the registered party or candidate that the voter wishes to vote for, and fold the ballot paper to conceal the vote. As discussed above, depending on a voter's place of residence they may receive either two (metro or local council) or three ballots (district council) in the municipal election, each of which will clearly state which election it is for.
- The voter must take the ballot papers to the ballot boxes and show it to the presiding officer or a voting officer in a way that the officer can see the official stamp on the back.
- The ballot papers must be placed in the ballot boxes.
- The voter must leave the voting station without delay.
- Disabled voters may be assisted to vote by a presiding officer or voting officer if they request it and in the presence of an accredited observer or two agents from different parties, if available.
- The Municipal Electoral Act also allows for a voter to submit a new ballot if they have accidentally marked it incorrectly or have changed their mind, provided the ballot has not yet been placed in the ballot box.³²

As soon as a ballot box is full, the presiding officer, in the presence of any party agents and candidates present, must seal the ballot box and allow those agents to affix their seals to it.³³ When the voting station closes, the presiding officer must seal each unused ballot box, and seal in separate containers the certified segment of the voters' roll for that voting district, the unused ballot papers, the cancelled ballot papers, and the written record of any objections concerning voting.³⁴

(ii) Counting of votes

Votes must be counted at the voting station at which those votes were cast, unless the IEC determines otherwise, or if the voting station is a mobile voting station.³⁵ This must begin as soon as the station is closed for voting.³⁶ After sorting the ballot papers, and before counting, the counting officer must reject any ballot paper that:

²⁸ Local Government: Municipal Electoral Act 27 of 2000 (accessible [here](#)).

²⁹ The IEC has developed a set of criteria for the appointment of presiding and deputy presiding officers, including that they should not have held political office or been politically active in the preceding five years.

³⁰ A voting district is the geographical area, drawn by the IEC, in an effort to minimise fraud and make administration more efficient. For more about voting districts and stations, see: <http://www.elections.org.za/content/Voters-Roll/About-voting-districts-and-stations/>.

³¹ Section 38(3) of the Electoral Act.

³² Local Government: Municipal Electoral Act 27 of 2000 at section 49, as amended by the Local Government Municipal Electoral Amendment Act No. 1 of 2016.

³³ Section 42 of the Electoral Act.

³⁴ Section 43(1) of the Electoral Act.

³⁵ Section 46(1) of the Electoral Act and section 56 of the Local Government: Municipal Electoral Act 27 of 2000.

³⁶ Section 46(2) of the Electoral Act.

- Indicates the identity of the voter;
- On which a vote is cast for more than one registered party or candidate;
- That is unmarked or marked in such a way that it is not reasonably possible to determine the voter's choice;
- That does not bear the official stamp of the presiding officer or voting officer; or
- That is not an official ballot paper.³⁷

After determining the provisional results for the municipal elections at a voting station, the counting officer must forward the result to the IEC and deliver the ballots and associated documentation to the local IEC. On receipt of these, the IEC must announce the result of the count in public.³⁸

(iii) Objections and appeals concerning verification

Any interested party can lodge an objection with the IEC concerning any aspect that is material to the determination of the final result of the election.³⁹ This must be done by no later than 17:00 on the second day after voting day.⁴⁰ The IEC must decide the objection within three days after it was served and notify the objector and other parties involved of its decision. If aggrieved by the IEC's decision, the objector or other party may appeal to the Electoral Court within a further three days, which must consider and decide the appeal and notify the parties to the appeal of its decision.⁴¹

It is noteworthy that an appeal to the Electoral Court does not suspend the declared result of an election.⁴²

(iv) Declaration of final result

Only the IEC has the legal authority to announce the election results.⁴³ The IEC is required to determine and declare the result of an election by adding together the results received from all voting stations within seven days after voting day.⁴⁴ However, the IEC has managed in all recent elections to make the final results announcement on the Saturday (four days) after the Wednesday elections.

HOW DOES THE PROCESS WORK?

Source: IEC, 'Municipal elections handbook', (2016) at p 69 (accessible [here](#)).

"The tabulation of results takes place at the voting station. Provisional results for each voting station are displayed outside the voting station when counting is finished. The results from each voting station are also sent to the municipal electoral offices, where they are verified and then scanned, captured, and transmitted to the [IEC's] central results system.

The dual scan-capture feature of this system makes the image of the original results slip available, together with the captured result. Moreover, the capturing entails a double-blind process and validations, and is audited by independent auditors.

The overall election results will be worked out at a centralised [Results Operation Centres (ROC)] under the control of the [IEC]: one national ROC based in Pretoria, Tshwane, and one ROC in each province."

Accredited media, observers, election monitors, party agents, and candidates are permitted to be present at the Results Operation Centres (ROCs).⁴⁵ The IEC may determine and declare the result of an election without having received the results of all voting stations, if waiting for all results would unduly delay the declaration of the final result and the outstanding results are not likely to materially influence the overall result of that election.⁴⁶

³⁷ Section 47(3) of the Electoral Act and section 61(1) of the Local Government: Municipal Electoral Act.

³⁸ Section 64 of the Local Government: Municipal Electoral Act.

³⁹ Section 65 of the Local Government: Municipal Electoral Act.

⁴⁰ *Ibid.*

⁴¹ *Ibid.*

⁴² *Ibid.*

⁴³ IEC, above n 2 at p 69.

⁴⁴ Section 57(1)(2) of the Electoral Act.

⁴⁵ IEC, above n 2 at p 69.

⁴⁶ Section 57(3) of the Electoral Act.

Councils then have 14-days within which to call their first sitting, at which key office-bearers are elected, including mayors, deputy mayors and speakers.⁴⁷

7. Electoral offences

Electoral fraud — which refers to illegal interference with the process of an election through deliberate wrongdoing — is a matter of particular concern and is a crime.⁴⁸ Electoral fraud can take place throughout the election period, both inside and outside of voting stations.⁴⁹

EXAMPLES OF ELECTORAL OFFENCES

Source: IEC, 'Municipal elections handbook', (2016) at pp 52-53 (accessible [here](#)).

It is an electoral offence to force anyone to do any of the following:

- To register to vote or not to register to vote.
- To vote or not to vote in an election.
- To support or not to support a particular political party or particular candidate.
- To vote or not to vote for a particular political party or particular candidate.
- To attend or not to attend a political event or rally of a political party.
- To interfere with the fairness or independence of the IEC or any officer of the IEC.

Chapter 7 of the Local Government: Municipal Electoral Act sets out prohibited conduct related to municipal elections. This includes, for instance, offences of undue influence, impersonation, intentional false statements, infringement of secrecy, prohibitions concerning voting materials and placards or billboards, and contraventions of the Electoral Code. Importantly, it also includes obstruction or non-compliance with the directions of the IEC or its officers, and a prohibition on the publication of exit polls. In terms of Section 109 of the Electoral Act, No. 73 of 1998, no persons including the media may print, publish, or distribute any exit polls taken in the elections in process during the hours of voting (7am to 7pm). An exit poll is when you count how many people voted and which parties you think they have supported. To do so, is an electoral offence; Any person who contravenes one of these sections is guilty of an offence, and if convicted may be liable to a fine or imprisonment.

8. Suggested resources

- Guidelines on Access to Information and Elections in Africa (accessible [here](#)).
- Government Communications, *Government system* in 'South African yearbook 2017/2018', (2018) (accessible [here](#)).
- Helen Suzman Foundation, 'The South African electoral system', (accessible [here](#)).
- IEC, 'Media guide: National and provincial elections', (2014) (accessible [here](#)).
- IEC, 'Municipal elections handbook', (2016) (accessible [here](#)).
- Open Society Foundation for South Africa, 'A touchpad for our future: An election resource for journalists (municipal elections 2011)', (March 2011) (accessible [here](#)).
- Constitution of South Africa, Sections 151-164 (accessible [here](#)).
- Yes Media, 'The Local Government Handbook South Africa 2021: A complete guide to municipalities in South Africa' (2021) (accessible [here](#)).
- Dullah Omar Institute, 'Electing Councillors: A Guide to Municipal Elections,' (2016) (accessible [here](#)).

⁴⁷ IEC, above n 2 at p 71.

⁴⁸ IEC, above n 2 at p 52.

⁴⁹ *Id.* at pp 52-53.

MODULE II

THE ROLE OF THE MEDIA DURING ELECTIONS

2021

MUNICIPAL ELECTIONS

MODULE II | THE ROLE OF THE MEDIA DURING ELECTIONS

RESOURCES FROM THE PRESS COUNCIL OF SOUTH AFRICA FOR ELECTIONS

The Press Council of South Africa (Press Council) has published two key resources that may be relevant for journalists in the upcoming elections:

- Press Council, 'Code of Conduct and Ethics for the South African Print and Online Media: Decoding the Code sentence by sentence', (1 January 2019) (accessible [here](#)).
- Press Council, 'Guidance notes: A brief for journalists covering the elections', (February 2019) (accessible [here](#)).

Overview of this module:

- The international law framework on the role of the media and the importance of access to information during elections.
- The regulatory framework and key provisions on elections relating to print and online media.
- The regulatory framework and key provisions on elections relating to broadcast media.
- Practical guidance for journalists covering the elections, including frequently asked questions.

1. Importance of the media during elections

The media plays a pivotal role in elections. As noted by the ACE Electoral Knowledge Network:⁵⁰

"The media are essential to democracy, and a democratic election is impossible without media. A free and fair election is not only about the freedom to vote and the knowledge of how to cast a vote, but also about a participatory process where voters engage in public debate and have adequate information about parties, policies, candidates and the election process itself in order to make informed choices. Furthermore, media acts as a crucial watchdog to democratic elections, safeguarding the transparency of the process. Indeed, a democratic election with no media freedom, or stifled media freedom, would be a contradiction."

The media plays many important roles in enabling full public participation in elections, including:

- Educating voters on how to exercise their democratic rights.
- Reporting on the development of an election campaign.
- Providing a platform for the political parties and candidates to communicate their message to the electorate.
- Providing a platform for the public to communicate their concerns, opinions, and needs to the parties and candidates, the election management body, the government and other voters, and to interact on these issues.
- Allowing parties and candidates to debate with each other.
- Reporting results and monitoring vote counting.
- Scrutinising the electoral process in order to evaluate the fairness of the process.⁵¹

⁵⁰ ACE Electoral Knowledge Network, 'Media and elections,' (accessible [here](#)).

⁵¹ *Id.*

The media is expected to maintain a high level of professionalism, accuracy, and impartiality in their coverage during the elections, and different regulatory frameworks exist to guide the media's conduct in this regard. There are different obligations that apply to different platforms, and it bears mention that broadcast media has far more stringent obligations than print media in relation to election coverage.

Members of the media should also exercise appropriate diligence when using social media. Although social media platforms can be a quick and effective way to reach wide audiences and provide up-to-date information, journalists should still apply a professional standard when using such platforms — whether in their personal capacities or for a media organisation — and ensure that any election coverage provided via social media meets the required standards of professionalism, accuracy, and impartiality. For more, see the Social Media Policy Guidelines issued by the Press Council in May 2020 [here](#).

TIPS FOR EDITORS AND REPORTERS TO STAY ON TOP OF THE 24/7 NEWSROOM

Source: Thomson Foundation, 'Covering elections' (accessible [here](#)).

- Monitor the social media universe, as social media can act as early warning indicators. However, this must be applied with caution. Social media can be a tool to collect news, but it can also be a source of rumours, lies, and hatred. Comments should be independently and rigorously verified.
- Journalism is increasingly online, even in traditional media. The internet provides infinite opportunities for reporting, commenting, and interacting with the public. Consider different formats to undertake civic education online.
- If social media is being used as a source for news, every link should be followed through the internet to its source and the original material evaluated. For example, avoid sharing links that have not been read in full.
- Look out for fake accounts, and do some research before spreading research from an account that you are not familiar with.

2. International law framework

There are three key treaties at the international level that have been ratified by South Africa and that are of particular relevance to the role of the media during elections:

- **International Covenant on Civil and Political Rights**, which enshrines the right to freedom of expression in article 19 and the right to participate in public affairs and vote in article 25.
- **African Charter on Human and Peoples' Rights**, which enshrines the right to freedom of expression in article 9 and the right to participate freely in government in article 13.
- **African Charter on Democracy, Elections and Governance**, which provides in article 27(8) that in order to advance political, economic, and social governance, states must commit themselves to promote freedom of expression, in particular press freedom, and fostering professional media.

There are also a number of relevant declarations and guidelines. Although these are not directly binding on states under international law, they are of relevance as a reflection of good practice and recognised principles:

- **Declaration of Windhoek on Promoting an Independent and Pluralistic African Press** (Windhoek Declaration), which is a statement of principles aimed at the promotion of an independent and pluralistic press.
- **African Charter of Broadcasting**, adopted by media practitioners at the ten-year celebration of the Windhoek Declaration, in an effort to expand the relevance of the Windhoek Declaration to address the need for independence and pluralism in radio and television broadcasting.

- **Declaration of Principles of Freedom of Expression and Access to Information in Africa**, which recognises the key role of the media and other means of communications in ensuring the full respect for freedom of expression, promoting the free flow of information and ideas, assisting people to make informed decisions, and facilitating and strengthening democracy. The African Commission on Human and Peoples' Rights (ACHPR) updated the Principles in 2019 to replace those from 2002 to address emerging issues and, particularly, developments in the internet age.
- **Guidelines on Access to Information and Elections in Africa** (ACHPR Guidelines), which focuses on access to information during elections. In addition to the guidelines for other stakeholders, it also includes guidelines for media and internet regulatory bodies, and for the media and online media platform providers.

ACHPR GUIDELINES AND THE MEDIA

The ACHPR Guidelines provide guidance to different stakeholders to meaningfully give effect to the right of access to information during elections. This includes guidelines for media and internet regulatory bodies, and for the media and online platform providers.

Media and internet regulatory bodies: The ACHPR Guidelines provide that such bodies should adopt regulations on media coverage during elections that ensure fair and balanced coverage of the electoral process, as well as transparency about political advertising policy on media and online media platforms.

Media and online media platform providers: The ACHPR Guidelines set out a list of information that print, broadcast, and online media, both publicly and privately owned, should proactively disclose. This includes, for example, editorial and ethical codes or guidelines; criteria and allocation of airtime or news coverage for political campaign advertisements and activities; and a plan for a transparent repository of all political advertisements.

3. The right of access to information during elections

The right of access to information is enshrined in section 32 of the Constitution, and it is given effect through the **Promotion of Access to Information Act 2 of 2000** (PAIA). The importance of the right is underscored by the fact that it is cross-cutting and is necessary for the realisation of other rights. As noted in the ACHPR Guidelines:

“For elections to be free, fair and credible, the electorate must have access to information at all stages of the electoral process. Without access to accurate, credible and reliable information about a broad range of issues prior, during and after elections, it is impossible for citizens to meaningfully exercise their right to vote in the manner envisaged by Article 13 of the African Charter [on Human and Peoples' Rights].”

The ACHPR Guidelines provide direction to different stakeholders in the electoral process who have a responsibility to proactively disclose information in their possession or control that is necessary for safeguarding the integrity and legitimacy of the electoral process. This includes election management bodies (EMBs); political parties and candidates; law enforcement agencies; election observers and monitors; media and online media platform providers; media regulatory bodies; and civil society.

In compliance with section 14 of PAIA, the Independent Electoral Commission (IEC) has published an access to information manual.⁵² Chapter 2, in particular, sets out the provisions relating to access to records, including the records kept in accordance with legislation; the categories of records held by the IEC that must be formally requested; and the automatic disclosures that are made available without formal request on the IEC's website and in the form of brochures. It also sets out the request procedure that must be followed.

⁵² IEC, 'Access to information manual', (February 2015) (accessible [here](#)).

PUBLICLY AVAILABLE IEC API FOR ELECTION DATA

Accessible [here](#).

An important development during the 2019 national elections was the decision by the IEC to make a live feed in the form of a publicly available API to provide election data in real-time to the media and other interested parties. The source data includes real-time voter and voting station information, as well as election results data. Requests for a username and password should be sent to webmaster@elections.org.za.

It should be noted that the right of access to information should be balanced against the right to privacy contained in section 32 of the Constitution. The **Protection of Personal Information Act 4 of 2013** (POPIA) sets out requirements that must be complied with for the permissible processing of personal information, provisions which will come into force from 1 July 2021. In addition to POPIA, the right to privacy is well-entrenched under South African law. In light of the reams of personal information collected and used during the election period, including voter information, respecting and protecting the right to privacy during the election period is critical.

4. The Electoral Code of Conduct

An introduction to the **Electoral Code of Conduct** (Electoral Code) has been provided in Module I. The important role of the media during elections has given rise to express recognition and protection of the media within the electoral law framework. However, as is to be expected, there are likewise specific rules and expectations relating to the media's conduct during election periods.

The Electoral Code requires political parties and candidates to respect the role of the media during elections.⁵³ It provides as follows:

“Every party and every candidate—

- (1) must respect the role of the media before, during and after an election conducted in terms of [t]he Electoral Act];
- (2) may not prevent access by members of the media to public political meetings, marches, demonstrations and rallies; and
- (3) must take all reasonable steps to ensure that journalists are not subjected to harassment, intimidation, hazard, threat or physical assault by any of their representatives or supporters.”

Section 80(a) of the Municipal Electoral Act provides that a conviction for a contravention or non-compliance with the Electoral Code may carry a fine or a sentence of imprisonment of up to ten years. In practice, political parties that breach the Electoral Code can, for instance, forfeit the party's election deposit; be stopped from working in an area; have their votes in an area cancelled; or have their party registration cancelled.

5. Print and online media

(i) The Press Code of Ethics and Conduct for South African Print and Online Media

The Press Council and the Interactive Advertising Bureau of South Africa (IABSA) have adopted the [Press Code of Ethics and Conduct for South African Print and Online Media](#) (Press Code), which is applicable to print and online media and which was updated in January 2020.⁵⁴ The Press Code sets out the standard expected of the print and online media, including with

⁵³ Section 8 of the Electoral Code.

⁵⁴ The Press Code, (2020) (accessible [here](#)).

regard to the gathering and reporting of news;⁵⁵ privacy and the protection of personal information;⁵⁶ children;⁵⁷ and violence and graphic content.⁵⁸

The preamble to the Press Code states:

“As journalists we commit ourselves to the highest standards, to maintain credibility and keep the trust of the public. This means always striving for truth, avoiding unnecessary harm, reflecting a multiplicity of voices in our coverage of events, showing a special concern for children and other vulnerable groups, and exhibiting sensitivity to the cultural customs of their readers and the subjects of their reportage, and acting independently.”

Section 2 of the Press Code also sets out the provisions regarding independence and conflicts of interest. Regarding payment for information, the Press Code provides that the media must avoid “shady journalism” in which informants are paid to induce them to give information, unless the material ought to be published in the public interest and the payment is necessary for this to be done.⁵⁹

Complaints against the media for contraventions of the Press Code are dealt with through the Complaints Procedures.⁶⁰ Complaints must be made within 20 working days of the publication of the offending material, except in special circumstances where the delay is justified. If a finding is made against a publication that has voluntarily become subject to the jurisdiction of the Press Ombud, the Complaints Procedure sets out the sanctions that may be applied, including a caution or reprimand to the publication; a direction that a correction, retraction, or apology be published; or that a complainant’s reply be published.⁶¹ A hierarchy of sanctions exists ranging from relatively minor infractions such as the misspelling of names to allowing commercial, political, personal, or other non-professional considerations to influence reporting.⁶²

(ii) Specific requirements for printed election material: Section 107 of the Electoral Act

Section 74 of the **Local Government Municipal Electoral Act 27 of 2000** (Municipal Electoral Act) places specific controls on printed election media from the time the election is called to the date the election results are announced. During this period:

- Any billboard, placard, poster, or pamphlet intending to have an effect on the outcome of the election must clearly state the full name and address of the printer and publisher.⁶³
- The publisher of any publication must put a heading on articles saying ‘advertisement’ if an article is paid for and comes from the following: (i) a party (including office-bearers); (ii) members and supporters; or (iii) a candidate contesting elections (including supporters).⁶⁴

6. Broadcast media

(i) The regulatory framework

There are a number of pieces of legislation of relevance to the broadcast media. This includes the following:

- **The Broadcasting Act 4 of 1999:** The stated objects of the Broadcasting Act⁶⁵ include to establish and develop a broadcasting policy in the public interest; to safeguard, enrich, and strengthen the cultural, political, social, and economic fabric of South Africa; to ensure plurality of news, views, and information; and to establish a strong and

⁵⁵ Section 1 of the Press Code.

⁵⁶ Sections 3-4 of the Press Code.

⁵⁷ Section 8 of the Press Code.

⁵⁸ Section 9 of the Press Code.

⁵⁹ Section 12 of the Press Code.

⁶⁰ The Press Council, ‘Complaints,’ (2020) (accessible [here](#)).

⁶¹ Section 7(2) of the Complaints Procedure.

⁶² Section 8 of the Complaints Procedure.

⁶³ Section 107(2) of the Electoral Act.

⁶⁴ Section 107(3) of the Electoral Act.

⁶⁵ Section 2 of the Broadcasting Act.

committed broadcasting service that will serve the needs of all South African society. Chapter IV of the Broadcasting Act provides for the incorporation of the SABC and for the Charter of the SABC.

- **The Independent Communications Authority of South Africa Act 13 of 2000** (ICASA Act): Section 3 of the ICASA Act establishes the Independent Communications Authority of South Africa (ICASA) as a juristic person that is independent and subject only to the Constitution and the law, and which is required to be impartial, perform its functions without fear, favour, or prejudice, and which must function without any political or commercial influence. ICASA is required to regulate broadcasting in the public interest and to ensure fairness and diversity of views broadly representing South African society; regulate telecommunications in the public interest; and achieve the objects in the underlying statutes.⁶⁶
- **The Electronic Communications Act 36 of 2005:** The aims of the Electronic Communications Act include to promote convergence and set up a legal framework for bringing together the broadcasting, broadcasting signal distribution, and telecommunications sectors. Regarding media coverage, the Electronic Communications Act deals with party election broadcasts,⁶⁷ political advertising on broadcast services,⁶⁸ and equitable treatment of political parties by broadcasting service licenses during the election period.⁶⁹

⁶⁶ Section 2 of the ICASA Act.

⁶⁷ Section 57 of the Electronic Communications Act.

⁶⁸ Section 58 of the Electronic Communications Act.

⁶⁹ Section 59 of the Electronic Communications Act.

SECTIONS 57-59 OF THE ELECTRONIC COMMUNICATIONS ACT

Sections 57-59 of the Electronic Communications Act are particularly relevant to the elections as they set out specific responsibilities during the election period:

- **Party election broadcasts:** Section 57 provides that a public broadcasting service licensee must permit a party election broadcast only during an election broadcast period, and only if the broadcast is produced on behalf of a political party at the instance of its duly authorised representative. It also requires ICASA to determine the time to be made available to political parties for this purpose and permits ICASA to impose any conditions on a public service broadcasting licensee with respect to party election broadcasts as it considers necessary. No party election broadcast may be broadcast later than 48 hours prior to the start of the polling period. Commercial or community media licensees are not required to broadcast party election broadcasts but must comply with the provisions of this section if they choose to do so.
- **Political advertising on broadcasting services:** Section 58 states that a broadcasting service licensee is not required to broadcast a political advertisement; however, in the event that they elect to do so, they must afford all other political parties a similar opportunity if they request it. A licensee may broadcast a political advertisement only during an election period and only if the broadcast is produced on behalf of a political party at the instance of its duly authorised representative. No political advertisement may contain any material that could reasonably be anticipated to expose the broadcasting service licensee to legal liability if broadcast. No political advertisement may be broadcast later than 48 hours prior to the start of the polling period. In making advertising time available to political parties, no broadcasting service licensee may discriminate against or give preference to any political party, or subject any party to any prejudice.
- **Equitable treatment of political parties by broadcasting service licensees:** Section 59 provides that if during an election period the coverage of any broadcasting service extends to the field of elections, political parties and issues relevant to this, the licensee must afford reasonable opportunities for the discussion of conflicting views and must treat all political parties equitably. If criticism is levelled against a political party during a programme without them having been afforded an opportunity to respond in the programme or without the view of the political party being reflected in the programme, the licensee must provide the party with a reasonable opportunity to respond to the criticism. In addition, if within 48 hours before the start of the polling period or during the polling period, a licensee intends to broadcast a programme in which a particular political party is criticised, the licensee must ensure that the political party is given a reasonable opportunity to respond, either in the same programme or as soon as is reasonably practicable thereafter.

In 2011, ICASA published the **Regulations on Municipal Party Election Broadcasts, Political Advertising, the Equitable Treatment of Political Parties by Broadcasting Licensees and Related Matters** (Municipal Election Broadcasting Regulations), published in terms of the ICASA Act.⁷⁰ The Municipal Election Broadcasting Regulations were amended in 2016 (see [here](#)) and provide useful guidance to broadcasters to ensure equitable treatment during municipal elections, including detailed guidelines for broadcasters related to the content of party election broadcasts and political advertising that is allowed during the election period. A distinguishing feature of broadcasting during the election period is the obligation to achieve equitable coverage of political parties without abdicating news value judgements.

At the time of publication, ICASA has published **draft Municipal Elections Broadcasting Regulations, 2020**. The new regulations require compliance both from political parties and independent candidates contesting the municipal elections and specify that current affairs programmes also fall within the scope of the regulations. ICASA is undertaking a public consultation process prior to finalising the regulations for the 2021 municipal elections.

⁷⁰ GN 101 of 2014 in GG No. 37350 (17 February 2014).

PRINCIPLES OF FAIRNESS IN ELECTION COVERAGE

Guideline 4(1) of the 2016 Municipal Election Broadcasting Regulations sets out the following principles of fairness:

- All news coverage should be fair to all interests concerned.
- Care should be taken to balance the exposure given to the non-political activities of candidates (such as attendance at functions, sporting events, and so on).
- All parties should receive equitable treatment on current affairs programmes. If the programme intends to feature party representatives, parties contesting the elections must be invited, with reasonable notice, to participate either in the same programme or in a series of programmes.
- The requirement that broadcasters give an opportunity for conflicting views to be heard should not be interpreted as a requirement that all parties be heard on any subject, only that all views be heard. Nor is it a requirement that all views be heard on the same programme.

Lastly, it is worth noting that in addition to the Municipal Elections Broadcast Regulations, broadcasting licensees must also follow the **Code of Conduct for Broadcasting Services** (Broadcasting Code), issued in terms of the Electronic Communications Act.⁷¹ The purpose of the Broadcasting Code is to set the standards according to which broadcasting service licences will be monitored by ICASA. The Broadcasting Code expressly indicates that during any election period, Sections 56, 57, 58 and 59 of the Electronic Communications Act apply. Licensees under the jurisdiction of the Broadcasting Complaints Commission of South Africa (BCCSA) are also required to follow the relevant **BCCSA Code of Conduct** (for Free to Air Licensees or Subscription Broadcasting Service Licensees).

(ii) Community Radio Election Guidelines

The **Community Radio Election Guidelines** were developed by the National Community Radio Forum in 1999 and have since been adapted for subsequent elections. While community media organisations are still required to follow all applicable broadcast and electoral laws and regulations that affect elections,⁷² the Community Radio Election Guidelines are aimed specifically at assisting community radio stations to entrench their role.⁷³ The guiding principles include contextualising and presenting news honestly; committing to the community's right to know the truth; and ensuring an open dialogue with listeners as part of accountability to the community.

In terms of programming, the Guidelines also set out particular considerations on which stations should base their election programming. This includes, for instance, focusing on their local community during the election; using languages preferred by their community; and ensuring that the community is informed about local day-to-day election developments. The Community Radio Election Guidelines contain similar provisions to the Municipal Election Broadcasting Regulations on the principles of equitability in broadcasting.

(iii) Complaints against broadcast media: ICASA and the BCCSA

ICASA consists of monitoring officers, who check whether broadcasters are following the terms, conditions, and duties of their licences, and complaints officers, who receive complaints from the public about broadcasters and arrange hearings before the Complaints and Compliance Committee (CCC). The CCC is a seven-person committee and is empowered to decide on complaints from the public about broadcasters not following licence conditions, to hold hearings with complainants and broadcasters, and to make recommendations to the ICASA Council on action to be taken against broadcasters.

⁷¹ GN 958 of 2009 in GG No. 32381 (6 July 2009).

⁷² Including ICASA's 'Community Broadcasting Services Regulations 2019 - with Reasons', (2019) (accessible [here](#)), which provide an operating framework for Community broadcasters as it relates to the registration, renewal, transfer, and amendment of licensees, their governance and management structures, and principles of community participation.

⁷³ IEC, 'Media guide: National and provincial elections', (2014) at p 79 (accessible [here](#)).

The Municipal Election Broadcast Regulations provide that any person who is aggrieved by a party election broadcast or political advertisement can lodge a complaint with ICASA within 48 hours after the broadcast.⁷⁴ ICASA is required to communicate the outcomes of the complaint to the parties within 48 hours of determining the complaint.⁷⁵

WHAT IS THE RELATIONSHIP BETWEEN ICASA AND THE BCCSA DURING ELECTIONS?

The National Association of Broadcasters established the BCCSA as a self-regulatory body that receives and decides on complaints from the public about its members. The BCCSA has its own constitution, Codes of Conduct and procedures, as well as its own complaints mechanism. However, for election-related matters, Section 14 of the BCCSA's Free-to-Air Code of Conduct for Broadcasting Service Licensees provides that:

"During any election period, as defined in the Act, sections 56, 57, 58 and 59 of the Act and regulations issued in terms thereof apply. The BCCSA does not have jurisdiction in these matters and complaints must be directed to the Complaints and Compliance Committee of the Independent Communications Authority of South Africa."

Notably, the BCCSA's Code of Conduct for Subscription Broadcasting Service Licensees does not contain an equivalent provision.

7. Practical tips for the media for election coverage

Reporting on local elections may require different approaches and skillsets, for various reasons:

- First, as detailed above, municipal elections use a hybrid system of both parties and independent ward candidates, and the method of voting differs depending on the type of municipality.
- Second, instead of a single national election, municipal elections comprise hundreds of separate races with different candidates, different contexts, and different core issues of concern to their electorate. For example, service delivery issues are of heightened importance in the context of municipal elections, but service delivery performance can differ widely by municipality. Politically motivated killings are also prevalent during municipal elections,⁷⁶ which have become increasingly contested in recent years. A 2017 study found that 66% of councillors and 60% of municipal managers reported being threatened.⁷⁷

Because of these nuances, it is worth noting some practical tips on how to report on municipal elections:⁷⁸

1. **Learn the structure:** Since municipal elections are unique, it is important to understand the structure of the municipal council, how councillors are elected, and so on, for each race you will be reporting on. For example, the editorial team needs to be able to answer the following questions:
 - 1.1. How is a ward councillor elected?
 - 1.2. What are the roles and responsibilities of the ward councillor?
 - 1.3. How are council leaders elected?
 - 1.4. What are the three types of municipal councils and how they are elected?
 - 1.5. What is the difference between metropolitan elections and local municipalities?
 - 1.6. How many council seats are required for each municipality?
2. **Know the responsibilities, powers and procedures:** Understanding how local municipalities work will provide a solid foundation for good stories. If you don't know a regulation has been violated, you will miss the story. You can use resources like [MunicipalIQ](#) and [GovChat](#) to track service delivery issues

⁷⁴ Regulation 7(1) of the Municipal Election Broadcast Regulations.

⁷⁵ Regulation 7(3) of the Municipal Election Broadcast Regulations.

⁷⁶ SALGA, 'Violence in Democracy', (2017) (accessible [here](#)).

⁷⁷ *Ibid*.

⁷⁸ The Journalist's Resource, 'Ten hints for covering government', (2011) (accessible [here](#)).

3. **Learn the language:** The local government terrain is full of jargon: IDPs,⁷⁹ EPWP,⁸⁰ MFMA,⁸¹ demarcation, proportional representation, and so on. To convey the story effectively to the public, you must have a thorough understanding of what these acronyms and jargon words mean.
4. **Use visual elements like graphs to simplify municipal election.**
5. **Learn the official players:** Key players at municipal levels differ from those at the national level, such as ward councillors, municipal managers, Members of Executive Councils (MECs), and so on. It is important to understand who they are, what their roles and responsibilities are, and where they fit in the broader system of local government.
6. **Cultivate sources at all levels of government:** Local government officials are at the coal-face of delivering services and making municipalities work, but they are frequently ignored by media who prioritise access to those higher up in government. Local officials can prove valuable sources on issues related to municipal elections.
7. **Listen and report on the “other voices”:** During municipal elections, the issues at stake are often those closest to the average person, such as service delivery. However, with the decline of local media in recent years, these stories are most frequently ignored. It is important to have the voices of those who are most affected at the forefront of one’s reporting.

FAQs FOR ELECTION COVERAGE

Do I need accreditation for voting or counting stations?	Media representatives do not need formal accreditation from the IEC to get access to voting or counting stations, but they are required to be clearly identifiable as members of the media. This is done by presenting a valid press identity card, or a signed letter from the editor on the organisation’s letterhead with an identity document or passport. If any difficulties are encountered, the presiding officer or counting officer should be approached for assistance. ⁸² Queries falling outside the mandate of the presiding officer will be escalated to the official spokesperson of the IEC at the Results Operation Centres (ROCs), either nationally or provincially.
Is the presiding officer obliged to grant me access to a voting station?	Access to a voting station is at the discretion of presiding officers, and they are under no obligation to grant the media access or to discuss activities in the voting station. If a member of the media is of the view that access has been unreasonably withheld, it is possible to appeal to the provincial electoral officer.
Do I need accreditation for access to the ROCs?	Members of the media will need accreditation to access all ROCs. The IEC will make available a list of contact persons for the national and provincial ROCs prior to the election date.
Who am I allowed to interview at the voting station?	With the exception of the presiding officer, no interviews may be conducted with any other staff of the voting station or the IEC at a voting station. Presiding officers are mandated to discuss voter turnout and arrangements for voting at their station. Voters, party agents, candidates and accredited observers have to be interviewed outside of the boundaries of a voting station.
Are there any visuals that are not permitted?	The publication of the following images or visuals by any person, including the media, is prohibited: an image of a marked ballot; any visuals inside the boundaries of a voting station, without the permission of the affected voter and the presiding officer; any visuals where the secrecy of a voter’s ballot may be compromised. ⁸³
Am I entitled to have access to the results slips?	Although copies of the results slips will not be made available to the media, a copy of the results slip for each election in each voting district is placed on the door of the voting station at the close of counting of ballots, which will enable the media to have

⁷⁹ Integrated Development Plan

⁸⁰ Expanded Public Works Programme

⁸¹ Municipal Finance Management Act

⁸² IEC, ‘Municipal elections handbook’, (2016) (accessible [here](#)).

⁸³ IEC, ‘Municipal elections handbook’, (2016) at p 59 (accessible [here](#)).

access to the results slips. The electronic results will be available on the IEC website as soon as the results have been verified and entered by the IEC's municipal offices.

Can I report on opinion polls?	There is no prohibition on the publication of opinion polls. However, caution should still be exercised. Questions to consider include: (i) who was interviewed; (ii) under what conditions were the interviews conducted; (iii) when was the poll conducted; (iv) who conducted the poll; and (v) what was the percentage of error? ⁸⁴ It is a good journalistic practice to disclose sample size, polling methodology, and margin of error if opinion poll data is used.
Can I report on exit polls?	Section 76 of the Municipal Electoral Act provides that no person –including the media – may print, publish, or distribute any exit polls taken during elections during the hours of voting.
What role do observers play?	An observer is a neutral outsider who is present and sees what happens during voting, counting, and the determination and declaration of results, and can tell the world that the process was transparent, free and fair – or not. Observers may be from civil society organisations, or from regional or international bodies such as the African Union (AU) or the Commonwealth, and can offer advice and support to the IEC. Observers are accredited in terms of the <u>Regulations on the Accreditation of Observers</u> , 1999, which includes a code of conduct for observers.

At the time of publication, the IEC had not yet published its media guide for the 2021 general election. While it is not anticipated that there are likely to be any significant changes from the IEC's approach in the 2016 municipal elections, it is advisable that all members of the media covering the elections familiarise themselves with the 2021 media guide once it is made available. The IEC's media guidelines for the 2016 municipal elections are accessible [here](#) (page 119-121).

8. Suggested resources

- Africa Check, 'Guide: Understanding and reporting on opinion polls', (5 March 2014) (accessible [here](#)).
- ESOMAR and WAPOR, 'Freedom to conduct opinion polls: A 2017 worldwide update', (2018) (accessible [here](#)).
- ICASA, 'Regulations on Party Election Broadcasts, the Equitable Treatment of Political Parties by Broadcasting Licensees and Related Matters', (2014) (accessible [here](#)).
- IEC, 'Access to information manual', (2015) (accessible [here](#)).
- IEC, 'Media guide: National and provincial elections', (2014) (accessible [here](#)).
- IEC, 'Municipal elections handbook', (2016) (accessible [here](#)).
- Windhoek Declaration (1991) (accessible [here](#)).
- Press Council, 'Code of Conduct and Ethics for the South African Print and Online Media: Decoding the Code sentence by sentence', (1 January 2019) (accessible [here](#)).
- Press Council, 'Guidance notes: A brief for journalists covering the elections', (February 2019) (accessible [here](#)).
- UNESCO, 'African Digital Platform for the Safety of Journalists' (accessible [here](#)).
- Centre for Human Rights, 'Proactive Disclosure of Information and Elections in South Africa,' (2020) (accessible [here](#)).

⁸⁴ Constitutional Rights Foundation, 'Election central: Assessing public opinion polls', (2019) (accessible [here](#)).

MODULE III
DISINFORMATION
DURING ELECTIONS
2021
MUNICIPAL ELECTIONS

MODULE III | DISINFORMATION DURING ELECTIONS

Overview of this module:

- Introduction to disinformation;
- The shortcomings of the term ‘fake news’, and alternative terminology to be used;
- The different regional and regulatory responses to address disinformation, and the measures being implemented in South Africa to address disinformation online during the elections and during the COVID-19 pandemic;
- The standard of care required by the media and the importance of media credibility;
- Guidelines for countering disinformation: the important role of the media in publishing counter-narratives, fact-checking and verification, and practical guidance for journalists.

1. Introduction to disinformation

Disinformation is not a new phenomenon. The intentional sharing of false information to cause public harm, or for monetary gain, is not a modern concept, however, the methods for sharing and distributing disinformation have taken on new forms in recent years. Digital and social media platforms have enabled the perpetrators of disinformation to reach a massive audience almost instantaneously, and this challenge has often overwhelmed those trying to find solutions to combat disinformation.

2. What is disinformation?

DEFINITION OF ‘DISINFORMATION’

Source: European Commission, ‘A multi-dimensional approach to disinformation: Report of the independent High Level Group on fake news and online disinformation’, (2018) at p 10 (accessible [here](#)).

“[A]ll forms of false, inaccurate, or misleading information designed, presented and promoted to intentionally cause public harm or for profit. It does not cover issues arising from the creation and dissemination online of illegal content (notably defamation, hate speech, incitement to violence), which are subject to regulatory remedies under ... national laws. Nor does it cover other forms of deliberate but not misleading distortions of facts such as satire and parody.”

The difference between malinformation, misinformation and disinformation will be unpacked later in the module.

Disinformation during an election period is particularly dangerous. For elections to be free, fair, and credible, it is of crucial importance that the electorate has access to accurate, credible, and reliable information. The insidious nature of disinformation works by creating confusion, doubt and mistrust in credible institutions (news media, independent electoral bodies etc,) which can affect how and where the public chooses to access information. If those sources of information are not a credible, the opportunity for false information is that much greater. This directly impacts the nature of a free and fair election.

Disinformation, misinformation, and other forms of false news during election periods is a scourge that has affected the fairness and credibility of elections in a number of countries around the world. For instance, in 2019 alone countries ranging from Brazil and India to Nigeria were said to have experienced their first “WhatsApp election” in which rumours, conjecture,

and lies spread so rapidly on the social media platform that they allegedly undermined the democratic process itself.⁸⁵ False information has become so prevalent and unavoidable, that during the Nigerian presidential election of 2019, President Muhammadu Buhari was forced to deny reports of his death and replacement by a clone.⁸⁶ Although not necessarily a new phenomenon, social media platforms have amplified the ease and reach of such information, which has made it imperative for measures to be put in place to respond to such challenges in a timely and effective manner. False news and disinformation also adapt quickly to new technologies and new methodologies, making efforts to address it even more difficult. African countries are also frequently used as ‘testing grounds’ for new disinformation techniques, as was witnessed with the Cambridge Analytica scandal when the notorious company used African countries to test its model which involved extensive data collection through Facebook which was subsequently used to target voters based on their perceived beliefs and to promote political polarisation.⁸⁷

More recently, research conducted by a number of academic institutions and civil society organisations has looked at the impact of disinformation during an election period and the measures that can be put in place to counter it. One of the greatest challenges is managing the balance between upholding and promoting freedom of expression whilst combating and regulating the very real threat of disinformation.

CASE STUDY: KENYA ELECTIONS 2017

Source: GeoPoll, ‘The reality of fake news in Kenya’, (2017) (accessible [here](#)).

According to a study conducted after the 2017 elections in Kenya, the research revealed that so-called ‘fake news’ was pervasive during the 2017 elections. The study showed the following results:

- 90% of respondents indicated having seen false or inaccurate information.
- 87% of respondents viewed this information as deliberately false.
- 76% of respondents indicated that they trusted mainstream media.
- 67% of respondents actively wanted comprehensive and detailed information.
- 78% of respondents wanted factual and accurate information.

The challenge of disinformation is truly a global one, extending beyond the political sphere to all aspects of information, including climate change, entertainment, and so on.⁸⁸ Disinformation thrives during a crisis — as is the case with the Covid19 pandemic. This can be explained by the fact that disinformation relies heavily on emotions. When one comes across content that evokes particular emotions, be it anger, disgust, sadness etc, the reader is more inclined to engage with the content and to share it. During a crisis, when emotions and anxieties are already higher than normal, disinformation simply further heightens this, creating the perfect storm for disinformation to be spread.

However, the consequences have arguably been seen most starkly, and most concerningly, in its impact on elections, with there being a real risk that widespread campaigns driven by intentionally false information can affect the outcome of an election. As has been noted, “disinformation hurts democracy by undermining our faith in our institutions, weakening voter competence, and splintering the electorate.”⁸⁹

The global picture is evolving daily, with a number of initiatives from various role-players being developed around the world, including from governments social media platforms. What has emerged is that the purveyors of disinformation prey on the vulnerability or partisan potential of recipients to amplify the message through likes, sharing of posts, and retweets.⁹⁰ In addition to the impact that this can have on the outcome of an election, it can also have an impact on peace, security, and stability in a country during the election period and beyond. For instance, disinformation can breed distrust and a lack of

⁸⁵ Cheeseman, Fisher, Hassan, and Hitchen, ‘Whatsapp, “Fake News” and African Elections: Between “Political Turmoil” and “Liberation Technology”’, *Journal of Democracy*, (July 2020) (accessible [here](#)).

⁸⁶ The Africa Report, ‘Africa’s fake news problem’, (3 June 2019) (accessible [here](#)).

⁸⁷ Ekdale, ‘African Elections as a Testing Ground: Comparing Coverage of Cambridge Analytica in Nigerian and Kenyan Newspapers’, *African Journalism Studies* (28 November 2019) (accessible [here](#)).

⁸⁸ UNESCO, ‘Journalism, ‘fake news’ and disinformation’: Handbook for journalism education and training’, (2018) at p 20 (accessible [here](#)).

⁸⁹ Wood, Ravel, and Dykhne, ‘Fool me once: Regulating ‘fake news’ and other online advertising’ 91 *Southern California Law Review* Vol. 1 No. 6 (2018) at p 3 (accessible [here](#)).

⁹⁰ UNESCO, above n 4 at pp 7-8.

confidence, or even ignite into violence when combined with existing tensions based on, for instance, race, ethnicity, or political affiliation; such tensions and conflict can, in turn, result in loss of life, internal displacement and despair, which have often left their mark in the aftermath of contested elections in other countries in the region.⁹¹

3. Defining the terminology

It is important to correctly define the different terms and the scope of what each term seeks to address. While ‘fake news’ has been the popular term, having only recently been popularised by politicians and particular media, there is an increasing trend to avoid using it. This is because current debates about so-called ‘fake news’ include a spectrum of different information types, ranging from relatively low-risk forms — such as honest mistakes made by reporters, partisan political discourse, and the use of clickbait headlines — to high-risk forms — such as foreign states or domestic groups that try to undermine political processes through the use of various forms of malicious fabrications.⁹² According to the European Commission, the term ‘fake news’ is both inadequate and misleading for the following reasons:⁹³

“The term is inadequate to capture the complex problem of disinformation, which involves content that is not actually or completely ‘fake’ but fabricated information blended with facts, and practices that go well beyond anything resembling ‘news’ to include some forms of automated accounts used for networks of fake followers, fabricated or manipulated videos, targeted advertising, organised trolling, and so on. It can involve a range of digital behaviour that is more about circulation of false information rather than the production of false information.

The term is also misleading because it has been appropriated by some politicians and their supporters to dismiss coverage that they find disagreeable. It has therefore become a weapon with which powerful actors can interfere in circulation of information and attack and undermine independent news media. Research has shown that citizens often associate the term ‘fake news’ with partisan political debate and poor journalism broadly, rather than more pernicious and precisely defined forms of disinformation.”

The other argument against the term concerns news media credibility. Simply, if content is news it cannot be fake, and if it is fake, it cannot be called news. According to UNESCO, “‘fake news’ is an oxymoron which lends itself to undermining the credibility of information which does indeed meet the threshold of verifiability and public interest – i.e. real news.”⁹⁴

Various other terms have therefore been used in this regard, with subtle but meaningful differences:

- **Misinformation**, which is generally used to refer to misleading information created or disseminated without manipulative or malicious intent.
- **Disinformation**, which is generally used to refer to deliberate (often orchestrated) attempts to confuse or manipulate people through delivering dishonest information to them.

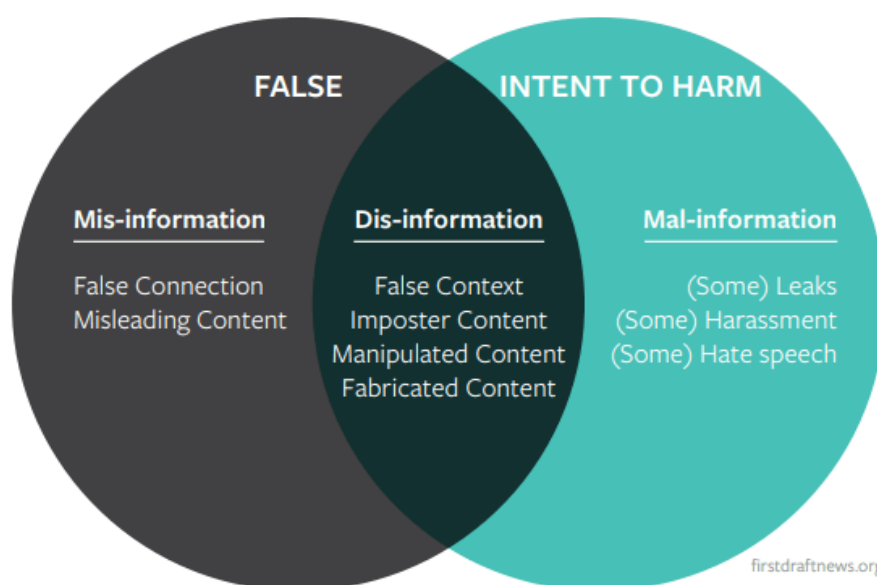
⁹¹ UNESCO, above n 4 at pp 7-8.

⁹² European Commission, ‘A multi-dimensional approach to disinformation: Report of the independent High Level Group on fake news and online disinformation’, (12 March 2018) at p 10 (accessible [here](#)).

⁹³ *Id.*

⁹⁴ UNESCO, ‘Journalism, ‘fake news’ and disinformation’: Handbook for journalism education and training’, (2018) at p 20 (accessible [here](#)).

The distinction in these terms has been illustrated as follows:⁹⁵



Source: UNESCO, 'Journalism, 'fake news' and disinformation': Handbook for journalism education and training', accessible [here](#).

In general, the term 'disinformation' is preferred for regulatory purposes because of two key elements that narrow the scope: (i) it requires intention, and therefore takes into account that people may inadvertently share false information without any untoward intention; and (ii) the required intention is targeted — for example, to cause harm or for profit — which both narrows the scope and seeks to address the negative consequences that can arise.

As discussed in more detail in respect of section 89(2) of the **Electoral Act 73 of 1998** (Electoral Act) below, the term 'disinformation' fits best with the South African legal framework.

4. Regional responses to disinformation

Responses to the issue of disinformation have varied across the world. Some regions have targeted the regulation of social media platforms, while others have simply shut down communication channels. What is certain, however, is that there is no single approach to tackle disinformation; rather, it requires a collaborate, multistakeholder solution. In recognition of the widespread and multinational scope of disinformation, regional bodies — such as the **African Commission on Human and Peoples' Rights** (ACHPR) and the European Commission — have sought to develop measures that can offer guidance to their member states.

For instance, in 2017 the **Joint Declaration on Freedom of Expression and 'Fake News', Disinformation and Propaganda** (Joint Declaration) was issued by the ACHPR Special Rapporteur on Freedom of Expression and Access to Information, together with the United Nations (UN) Special Rapporteur for Freedom of Opinion and Expression, the Organization for Security and Co-operation in Europe Representative on Freedom of the Media, and the Organisation of American States Special Rapporteur on Freedom of Expression. The preamble to the Joint Declaration encompasses the competing concerns that arise when dealing with this issue:

- It is often designed and implemented to mislead a population.
- Some forms of disinformation and propaganda may harm individual reputations and privacy, or incite violence, discrimination, or hostility against identifiable groups in society.

⁹⁵ UNESCO, above n 4 at p 46.

- Some public authorities denigrate, intimidate, and threaten the media, including by stating that the media is “the opposition” or is “lying” and has a hidden political agenda, which increases the risk of threats and violence against journalists, undermines public trust and confidence in journalism as a public watchdog, and may mislead the public by blurring the lines between disinformation and media products containing independently verifiable facts.
- It stresses that the human right to impart information and ideas is not limited to correct statements, and that the right also protects information and ideas that may shock, offend, and disturb. It states further that “prohibitions on disinformation may violate international human rights standards, while, at the same time, this does not justify the dissemination of knowingly or recklessly false statements by official or State actors.”

KEY PRINCIPLES FROM THE JOINT DECLARATION FOR SOLUTIONS TO DISINFORMATION

(accessible [here](#)).

Three key principles can be distilled from the Joint Declaration:

- Proposals to address disinformation should avoid offering general prohibitions on speech as solutions, as this is unlikely to meet the test for a justifiable limitation of freedom of expression.
- State actors should not make, sponsor, encourage, or disseminate disinformation or propaganda.
- In addition to not disseminating disinformation or propaganda, state actors should also take positive steps to disseminate reliable and trustworthy information, including on matters of public interest.

The European Commission has been engaging in an extensive study to develop proposals and measures to be implemented in Europe to tackle disinformation.⁹⁶ In line with the above proposals, in September 2018, the European Commission published a Code of Practice on Disinformation, including an Annex of Best Practice and Annex on Current Best Practices from Signatories of the Code of Practice. These documents contain voluntary, self-regulatory standards agreed to by industry stakeholders to address disinformation. By mid-2020, most of the world’s largest tech platforms had signed on to the Code of Practice, including Facebook, Google, Twitter and TikTok.⁹⁷ These companies provide monthly reports on their “their actions undertaken to improve the scrutiny of ad placements, ensure transparency of political and issue-based advertising and to tackle fake accounts and malicious use of bots,” which the Commission publishes together with its own assessments.⁹⁸ Signatories also provided reports on their actions to counter misinformation during the COVID-19 pandemic.

⁹⁶ The proposals include the following: a code of practice on disinformation; an independent European network of fact-checkers; a secure European online platform on disinformation; enhancing media literacy; resilience of elections; voluntary online identification systems; support for quality and diversified information; coordinated strategic communication policy. See: European Commission, ‘Tackling online disinformation: Commission proposes EU-wide Code of Practice’, (26 April 2018) (accessible [here](#)).

⁹⁷ European Commission, ‘Code of Practice on Disinformation’, (2021) (accessible [here](#)).

⁹⁸ *Id.*

HOW THE UN IS FIGHTING THE COVID-19 'INFODEMIC'

(accessible [here](#)).

The coronavirus (COVID-19) pandemic has generated significant amounts of mis- and dis-information about potential cures, causes of the virus, and vaccines. In order to counter this “infodemic”, the UN has taken five steps to combat misinformation:

1. Produce and disseminate facts and accurate information. As a point of departure, the UN identified that the World Health Organisation (WHO) is at the foreground of the battle against the pandemic and that it is transmitting authoritative information based on science while also seeking to counter myths. Identifying sources such as the WHO that produce and disseminate facts is a central tenet to countering misinformation.

Partner with platforms and suitable partners. Allied to the distribution of accurate information is finding the right partners. The UN and the WHO have partnered with the International Telecommunications Union (ITU) and the UN Children’s Fund (UNICEF) to help persuade all telecommunications companies worldwide to circulate factual text messages about the virus.

Work with the media and journalists. The UN’s Educational, Scientific and Cultural Organization (UNESCO) has published two policy briefs that assess the COVID-19 which assist journalists working on the frontlines of the “infodemic” around the world to ensure accurate, trustworthy and verifiable public health information.

Mobilise civil society. Through the UN Department of Global Communications, key sources of information on opportunities to access, participate and contribute to UN processes during COVID-19 have been communicated to civil society organisations (CSOs) to ensure that all relevant stakeholders are communicated.

Speak out for rights. Michelle Bachelet, recently joined a chorus of other activists, to speak out against restrictive measures imposed by states against independent media, as well as the arrest and intimidation of journalists, arguing that the free flow of information is vital in fighting COVID-19.

- Proposals to address disinformation should avoid offering general prohibitions on speech as solutions, as this is unlikely to meet the test for a justifiable limitation of freedom of expression.
- State actors should not make, sponsor, encourage, or disseminate disinformation or propaganda.
- In addition to not disseminating disinformation or propaganda, state actors should also take positive steps to disseminate reliable and trustworthy information, including on matters of public interest.

5. The challenge of regulating disinformation

The advent of the internet and the exponential increase in popularity of social media platforms has led to the weaponisation of information on an unprecedented scale. New technology, such as ‘deep fake’ videos and the editing of photographs, has made the manipulation and fabrication of content simple. Furthermore, social networks dramatically amplify falsehoods — be they from states, politicians, corporate entities, or others — that are then shared by susceptible members of the public.⁹⁹ Sophisticated disinformation is often persuasive because it looks credible.

However, unlike incitement, terrorism advocacy, or child sexual abuse material (CSAM), this has been more complex to regulate as it is not necessarily illegal content, particularly in a democratic context where political speech is recognised as deserving of strong free speech protections.¹⁰⁰ The complexity is exacerbated by the cross-border nature of social media platforms, with the potential for disinformation arising from both domestic and foreign sources. Given time and resource constraints, as well as a lack of digital literacy skills, voters may not dig deeper into false stories to verify the information.

Various countries have sought to impose regulatory measures aimed at the dissemination of false information.¹⁰¹ It is concerning, however, that the regulatory measures being proposed or implemented in many countries tend towards

⁹⁹ UNESCO, above n 4 at p 15.

¹⁰⁰ The Guardian, ‘Global crackdown on fake news raises censorship concerns’, (24 April 2018) (accessible [here](#)).

¹⁰¹ Poynter, ‘A guide to anti-misinformation actions around the world’, (24 July 2018) (accessible [here](#)).

criminalising the dissemination of false information. This gives rise to serious concern, as there is always the risk that criminalising speech will have a chilling effect on the right to freedom of expression.

It is important to note that in March 2020, South Africa criminalised the publication of “statements intended to deceive any person about COVID-19 or the government’s response to the pandemic.”¹⁰² At the time of publication, this regulation was still in force, and the news media should therefore take particular care not to infringe the new regulations in their reporting on the pandemic.

THE NETWORK ENFORCEMENT LAW IN GERMANY

Accessible [here](#).

Germany has enacted the *Netzwerkdurchsetzungsgesetz*, or Network Enforcement Law, which came into force in October 2017, with a transition period until 1 January 2018. In terms of the law, social media platforms are required to implement procedures that allow users to report unlawful content, which is defined as anything that violates Germany’s Criminal Code. This includes disinformation. If social media platforms systematically fail to establish and enforce such reporting complaint management systems, they can be fined with penalties of up to €50 million based on the law. Social networks also have to publish a report every six months detailing how many complaints they received and how they dealt with them.

As noted in the Joint Declaration, the right to freedom of expression is not limited to the protection of correct statements and includes protection for information and ideas that may shock, offend, and disturb. Any regulatory measure that imposes restrictions on the dissemination of false information needs to be balanced against the right to freedom of expression contained in section 16 of the Constitution and needs to comply with the provisions of section 36 of the Constitution for it to be a justifiable limitation.

When considering the legal framework around disinformation, and the regulatory responses thus far, it becomes clear that there is no silver bullet to the regulation of disinformation. On the one hand, the rights to freedom of expression and freedom of speech must be upheld, while tackling the very real danger of disinformation, and putting measures in place to minimise the impact. Across the African continent, there have been various attempts to tackle the issue of digital disinformation, while ensuring a human rights approach is upheld.

¹⁰² SANEF, ‘South Africa Enacts Regulations Criminalizing ‘Disinformation’ on Coronavirus Outbreak’, (2020) (accessible [here](#)).

6. Guidelines for dealing with disinformation online in the upcoming local government elections

ELECTORAL LAWS REGARDING FALSE INFORMATION

Section 69 of the Local Government: Municipal Electoral Act 27 of 2000 (Municipal Electoral Act): Intentional false statements:

- “(1) No person, when required in terms of this Act to make a statement, may make a statement–
- (a) knowing it is false;
 - (b) without believing on reasonable grounds that the statement is true.
- (2) No person may publish any false information with the intention of–
- (a) disrupting or preventing an election;
 - (b) creating hostility or fear in order to influence the conduct or outcome of an election; or
 - (c) influencing the conduct or outcome of an election.”

Section 9(1)(b) of the Electoral Code of Conduct (Electoral Code) in the Municipal Electoral Act: Prohibited conduct:

- “(1) No party or candidate may–
- ...
- (b) publish false or defamatory allegations in connection with an election in respect of–
 - (i) a party, its candidates, representatives or members; or
 - (ii) a ward candidate or that candidate’s representatives”.

Although South Africa does not have a comprehensive law dealing with disinformation, section 69(2) of the Municipal Electoral Act contains an express prohibition against the publication of false statements with the intention of causing one of the three listed harms: (i) disrupting or preventing an election; (ii) creating hostility or fear in order to influence the conduct or outcome of an election; or (iii) influencing the conduct or outcome of an election. A person convicted of an offence can be sentenced to a fine or imprisonment for up to ten years.¹⁰³

In an effort to give effect to this provision, Media Monitoring Africa (MMA) together with SANEF and other stakeholders have built an [online portal](#) and complaints mechanism for members of the public to lodge complaints regarding disinformation online that falls within the scope of the Municipal Electoral Act. As part of this process, a committee of experts considers complaints on disinformation and makes recommendations on the proposed recourse to take based on the specific type of disinformation and potential harm caused.

¹⁰³ Section 69(2) of the Municipal Electoral Act.

RESEARCH BY MEDIA MONITORING AFRICA REGARDING DISINFORMATION

Media Monitoring Africa (MMA) has undertaken extensive research in respect of disinformation and possible strategies and approaches for elections. This includes a discussion document for the 2019 National and Provincial Elections titled 'Disinformation and 'fake news' during elections: Proposals for the upcoming 2019 General Elections in South Africa'. In the lead up to the national elections in 2019, MMA also launched a platform, [the Real411](#), in collaboration with SANEF and other partners, for reporting complaints about election-related disinformation.

Following the elections and the success of the complaints platform, the scope of categories of digital offences expanded to include four different types of digital offences: disinformation, hate speech, incitement to violence and journalist harassment. Complaints are initially reviewed by technology, legal and media experts, and then further assessed by a legal practitioner to determine the action to be taken if the content does indeed fall into one of the four above mentioned categories.

More about MMA's work on disinformation and 'dodgy news' can be accessed here: <https://www.mediamonitoringafrica.org/>.

The Electoral Code is also relevant to disinformation. Section 4(1)(a) states that every party and candidate must, among other things, publicly state that everyone has the right to freely express their political beliefs and opinions, to challenge and debate the political beliefs and opinions of others, and publish and distribute election and campaign materials. Section 4(1)(b) requires every registered party and candidate to "publicly condemn any action that may undermine the free and fair conduct of elections."

Section 9 sets out the prohibited conduct in terms of the Electoral Code. Of particular relevance, section 9(1)(b) provides that no party or candidate may publish false or defamatory allegations in connection with an election in respect of a party, its candidates, representatives or members, or a ward candidate or that candidate's representatives. Section 9 should be read with section 3(b) of the Electoral Code, which requires all parties and candidates to instruct candidates, representatives, members, and supporters to comply with this provision as well.

7. Standard of care by the media

Various codes of conduct — including the Press Code of Ethics and Conduct for South African Print and Online Media ([the Press Code](#)), the Independent Communications Authority of South Africa (ICASA) Code of Ethical Conduct ([ICASA Code](#)) and the Broadcasting Complaints Commission of South Africa ([BCCSA Codes of Conduct](#)) — place requirements on members of the media to report news truthfully, accurately, and fairly. Different media organisations will likely put in place different measures to achieve this, to ensure that reasonable steps are taken to meet these requirements. However, there will inevitably be instances in which members of the media will make mistakes. Members of the media should at all times conduct themselves in a manner that is reasonable and compliant with the ethical standards expected of the profession.



NATIONAL MEDIA LIMITED AND OTHERS V BOGOSHI

[1998] ZASCA 94

The case of *National Media Limited and Others v Bogoshi* deals with developing the reasonableness defence available to a media institution for publishing a false and defamatory statement. The Supreme Court of Appeal held that:

“In my judgment we must adopt this approach by stating that the publication in the press of false defamatory allegations of fact will not be regarded as unlawful if, upon a consideration of all the circumstances of the case, it is found to have been reasonable to publish the particular facts in the particular way and at the particular time.

In considering the reasonableness of the publication account must obviously be taken of the nature, extent and tone of the allegations. We know, for instance, that greater latitude is usually allowed in respect of political discussion ... and that the tone in which a newspaper article is written, or the way in which it is presented, sometimes provides additional, and perhaps unnecessary, sting. What will also figure prominently, is the nature of the information on which the allegations were based and the reliability of their source, as well as the steps taken to verify the information. Ultimately there can be no justification for the publication of untruths, and members of the press should not be left with the impression that they have a licence to lower the standards of care which must be observed before defamatory matter is published in a newspaper.”

Although the judgment pre-dates the current debates regarding the dissemination of false information online, the guidance is nevertheless of relevance, particularly with regard to the factors that ought to be considered when determining whether the publication of false information was justifiable.

It must also be remembered that denigrating certain legitimate news reports as ‘fake news’ has been used as a political tool to stifle criticism. In other parts of the continent, members of the media are still seeking to challenge the criminal offence of publishing false information, which has historically been used as an intimidation tactic to silence journalists.¹⁰⁴ As noted in the preamble to the Joint Declaration, mentioned above, public authorities claim that the media is lying and has a hidden political agenda, in an effort to undermine public trust and confidence in journalism. This may in turn mislead the public by blurring the lines between disinformation and media products containing independently verifiable facts.

However, this does not absolve the media of responsibility. As noted by UNESCO, “it is a time for news media to tack more closely to professional standards and ethics, to eschew the publishing of unchecked information, and to take a distance from information which may interest some of the public but which is not in the public interest.”¹⁰⁵ It notes further that all news institutions and journalists — whatever their political leanings — should avoid inadvertently and uncritically spreading disinformation and misinformation.¹⁰⁶ Furthermore, journalists cannot leave it to fact-checking organisations alone to do the journalistic work of verifying questionable claims that are presented by sources. Journalism also needs to proactively detect and uncover new cases and forms of disinformation.¹⁰⁷

¹⁰⁴ See, for example, the judgment of the Community Court of Justice of the Economic Community of West African States in *Federation of African Journalists and Others v The Republic of the Gambia*, Judgment No. ECW/CCJ/JUD/04/18 (13 March 2018), in which it held that the false news provision contained in the Criminal Code did not conform with the international law standards on freedom of expression contained in article 9 of the African Charter on Human and Peoples’ Rights and article 19 of the International Covenant on Civil and Political Rights.

¹⁰⁵ UNESCO, above n 4 at p 11.

¹⁰⁶ *Id.* at p 11.

¹⁰⁷ *Id.* at pp 11-12.

DIFFERENT FORMS OF FALSE CONTENT

Source: UNESCO, 'Journalism, 'fake news' and disinformation': Handbook for journalism education and training', (2018) (accessible [here](#)).

- **False connection**, in which headlines, visuals, or captions do not support the content (commonly referred to as 'clickbait').
- **Misleading content**, in which there is a misleading use of information to frame issues or individuals in certain ways, such as by cropping photographs, or choosing quotes or statistics selectively.
- **False context**, in which genuine information is re-circulated outside of its original context.
- **Imposter content**, in which journalists have their by-lines used alongside articles they did not write or their organisations' logos used in videos or images they did not create.
- **Manipulated content**, in which genuine content is manipulated to deceive, such as an image being manipulated to impute an improper relationship between two people.
- **Fabricated content**, which includes completely fabricated 'news' websites or fabricated images.

Referred to as 'information disorder', journalists need to separately examine the elements of information disorder: the agent, the messages, and the interpreter, as well as the different phases of information disorder: creation, production and distribution.

8. Guidelines for countering disinformation

Disinformation is a complex issue and therefore requires a multifaceted response. However, there are a number of practical ways in which journalists and the media are able to — indeed have the responsibility to — take steps in order to contribute to minimising the harm caused by disinformation.

One of the key roles the media can play in addressing the challenge of disinformation is in publishing counter-narratives that provide corrections to false information and that highlight the work being done by fact-checking organisations. In essence, instead of killing a false story, this approach causes a story to be surrounded with related, credible articles to provide the reader with more context and alternative views.¹⁰⁸ This invites easier access to alternative perspectives and information, including articles by third-party fact-checkers. While this approach raises questions about algorithmic transparency on social media platforms, it is an approach that some platforms have already begun to implement through suggested content appearing alongside a particular post.

This does require consideration for how the additional information can be made relatable to the audience to whom the false information was targeted, and can be readily accessed. The effect of misinformation can be very strong, and requires engagement and participation from audiences to be persuaded.

A 2017 study on misinformation recommends the following approaches for debunking misinformation:¹⁰⁹

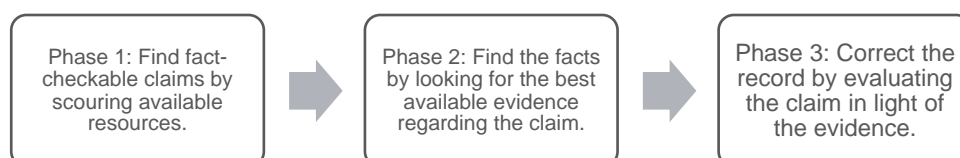
- **Reduce arguments that support misinformation:** News accounts about misinformation should not inadvertently repeat or belabour detailed thoughts in support of the misinformation.

¹⁰⁸ Alemanno, 'Editorial: How to counter fake news? A taxonomy to anti-fake news approaches', in *European Journal of Risk Regulation* 9 (2018) at p 4 (accessible [here](#)).

¹⁰⁹ Annenberg Public Policy Center of the University of Pennsylvania, 'Debunking study suggests ways to counter misinformation and correct 'fake news'', (12 September 2017) (accessible [here](#)).

- **Engage audiences in scrutiny and counterarguing of information:** A state of healthy scepticism should be promoted. When trying to correct misinformation, it is beneficial to have the audience involved in generating counterarguments.
- **Introduce new information as part of the debunking message:** People are less likely to accept debunking when the initial message is just labelled as wrong rather than countered with new evidence.

Fact-checking of information has also been key to countering disinformation. In general, fact-checking comprises three phases:¹¹⁰



There are various online tools that can be used to assess the credibility of a particular online news resource. MMA, for example, has developed KnowNews, a browser extension for Google Chrome and Firefox that can be downloaded to help identify the credibility of a news website. The KnowNews database is a collection of news publishers, and once installed the KnowNews icon provides a colour-coded guide to how trustworthy a website is considered. People can also verify the existence of a news entity by going to <https://openanddisclose.org.za/>.

MMA has also built an app, RoveR, that enables users to fulfil three core functions: (i) upgrade their skills on spotting real versus false news by going through a few learning modules; (ii) testing their skills on spotting real versus false news through quizzes; and (iii) preventing sharing of false news by allowing users to check the credibility of the website from which it is obtained. RoveR can be downloaded from the Google Play Store or from here: <https://rover.directory/>.

Africa Check — a non-partisan organisation that works towards accuracy and honesty in public debate and the media in Africa — explains their approach to fact-checking in the following eight steps:¹¹¹

STEP TO BE TAKEN	HOW IT WORKS
Step 1: Select the claim to check	At Africa Check, the editors sift through the suggestions sent in by readers and raised by the team, based on criteria set out on the website: the importance of the topic, whether the claim was framed as a statement of fact or opinion, whether the claim matters, and whether it is a speaker Africa Check has focused on before.
Step 2: Establish exactly what was said	Once the topic is selected, it is necessary to establish exactly what was said. The precise wording is needed. Consider the following questions: What exactly did they say? Was it as reported? And what was the context in which it was said?
Step 3: Ask for their evidence	Having established the claim, try to contact the speaker or their office, and ask what evidence they have for their claim.
Step 4: Check archives and other sources	Check through archives and other publicly available sources, both for evidence that supports and that contradicts the claim. It is advisable to cast the net as widely as possible. Africa Check's <u>InfoFinder</u> tool can be a useful resource.

¹¹⁰ UNESCO, above n 4 at p 89.

¹¹¹ Africa Check, 'How we work', (undated) (accessible [here](#)).

Step 5: Discuss the evidence with experts	Having secured the evidence, this should be discussed with specialist experts where necessary to help understand the data. According to Africa Check, they only discuss with experts willing to go on the record, and do not use anonymous sources.
Step 6: Write up the report, setting out the evidence step-by-step and providing links	The next step is to write up the report, setting out the following: (i) the claim that was made and the context in which it was delivered and reported; (ii) the evidence that supports the claim; (iii) any contrary evidence; and (iv) a balanced conclusion. For all evidence, a link or source should be provided.
Step 7: Have a colleague review the report and findings	To ensure that the report itself is accurate, a colleague should be asked to review the report, and independently assess the findings, before it is finalised.
Step 8: Publish and monitor feedback	Finally, the report is published, and feedback is monitored. If or when a reader identifies an error, the report is updated openly.

In February 2019, the Fact-Checkers Legal Support Initiative was launched to connect fact-checkers with *pro bono* lawyers, to help pay legal fees for fact-checkers under threat in order for them to continue to do their work. As noted on the website, in recent years non-partisan fact-checking has emerged as a vital tool to address the spread of misinformation; however, the individuals and organisations who check facts are being targeted with online harassment, physical threats, and legal proceedings. For more information about this initiative, please visit: <https://factcheckerlegalsupport.org/>.

When dealing with the spread of false information, verifying source content and visual content is also important. Verification tools can be used to establish where a source has posted from, but it is also possible to manually triangulate a source by analysing their social media history to check for clues that could indicate the feasibility of them being in a particular place at a particular time.¹¹² Examining the history of their interactions with other users and checking linked content within posts also assists in the manual verification process and can help eliminate information shared by bots.¹¹³

CHECKLIST OF VERIFYING VISUAL CONTENT

Source: UNESCO, 'Journalism, 'fake news' and disinformation': Handbook for journalism education and training', (2018) at pp 105-106 (accessible [here](#)).

While it may not be possible to ascertain with full certainty the provenance of visual content, there are several indicators that can be uncovered through a verification process that asks:

- Is the content original, or has it been 'scraped' from previous reporting and re-appropriated misleadingly?
- Has the content been digitally manipulated in some way?
- Can we confirm the time and place of the photograph or video capture, using available metadata?
- Can we confirm the time and place of the photograph or video capture, using visual clues in the content?

In order to assess these indicators, it is also useful to understand the different types of false or misleading visual content that commonly arise.¹¹⁴ This includes, for instance, wrong time/wrong place content that re-shares old visuals with new claims about what they show; manipulated content that has been digitally manipulated using editing software; or staged content that creates or shares original content with the intention of misleading.¹¹⁵

¹¹² UNESCO, above n 4 at p 105.

¹¹³ *Id.* at p 105.

¹¹⁴ *Id.* at pp 105-106.

¹¹⁵ *Id.* at pp 105-106.

It should be emphasised that in many instances, there will not be one single indicator that reveals whether the image or content is false information. Rather, the relevant conclusion is reached on a balance of all the information that is available. It is also important to remember that not all false information is intended to mislead or be malicious; this can sometimes arise from a genuine error of fact or judgment.

While the tools and resources available to assist with fact-checking and verification processes are invaluable, journalists should also remember that there will be times when one's instinct — in conjunction with discussions with editors and the broader news team — will play a key determining factor in assessing particular content.

TOOLS AND TIPS FOR VERIFICATION

- **Intel Techniques** undertakes Facebook account analysis and enables a journalist to find out more about a source by analysing their Facebook account (accessible here: <https://inteltechniques.com/osint/facebook.html>).
- **Google Reverse Image Search** enables a journalist to check if the image database contains an earlier version of that image, in order to ascertain whether the image is being recycled to support a new claim or event (accessible here: <https://support.google.com/websearch/answer/1325808?hl=en>).
- **YouTube Data Viewer** can detect video thumbnails for YouTube videos and facilitate a reverse image search on those thumbnails to check if earlier versions of the video have been uploaded (accessible here: https://firstdraftnews.org/curriculum_resource/youtube-data-viewer/).
- **Geolocation** is the process of determining where the video or image was captured. This can be obtained from metadata or by cross-referencing visual characteristics and landmarks from the content with satellite imagery, street-view imagery and content available from other sources.
- **Weather corroboration** relies on historical weather data to check if the weather observable in visual content is corroborated by the historic record.
- **Shadow analysis** examines the internal consistency of any shadows, such as where one would expect them to be and whether the visible shadows are consistent with the light sources.
- **Image forensics** seeks to detect inconsistencies in image metadata that suggest manipulation.

9. Suggested resources

- A. Alemanno, 'Editorial: How to counter fake news? A taxonomy to anti-fake news approaches', in *European Journal of Risk Regulation* 9 (2018) (accessible [here](#)).
- C. Silverman, 'Verification handbook: The ultimate guideline on digital age sourcing for emergency coverage', (undated) (accessible [here](#)).
- Data & Society, 'Reading metadata' in *Data craft: The manipulation of social media metadata*, (undated) (accessible [here](#)).
- European Commission, 'A multi-dimensional approach to disinformation: Report of the independent High Level Group on fake news and online disinformation', (2018) (accessible [here](#)).
- European Parliament, 'Societal costs of 'fake news' in the Digital Single Market', (2019) (accessible [here](#)).
- S. Rajaratnam School of International Studies and Centre of Excellence for National Security, 'Policy report: Countering fake news: A survey of recent global initiatives' (March 2018) (accessible [here](#)).
- UNESCO, 'Journalism, 'fake news' and disinformation': Handbook for journalism education and training', (2018) (accessible [here](#)).

MODULE IV SAFETY OF JOURNALISTS ON- AND OFFLINE

2021

MUNICIPAL ELECTIONS



MODULE IV | SAFETY OF JOURNALISTS

ON- AND OFFLINE

SAFETY KIT FOR JOURNALISTS COVERING THE 2019 SOUTH AFRICAN ELECTION

The [Committee to Protect Journalists](#) (CPJ) published a dedicated safety kit for journalists, specifically geared towards the 2019 General Elections in South Africa. The toolkit draws on the experiences and best practices from other countries, and contains practical advice for journalists to protect themselves, both on- and offline, and may provide relevant guidance for the 2021 Local Municipal Elections. CPJ's safety kit is accessible [here](#).

Overview of this module:

- The types of threats, harassment, and attacks faced by the media — including gender-specific — and the obligations on the state and media organisations.
- The importance of the protection of sources, as recognised under our domestic case law.
- Practical guidance for journalists to protect themselves online, including on social media, and in reporting during the COVID-19 pandemic.
- Practical guidance for journalists on where they can seek assistance and recourse in the event of threats, harassment or attacks.

1. Attacks on journalists

As noted in the ACHPR Resolution on the Safety of Journalists and Media Practitioners in Africa (2011),¹¹⁶ freedom of expression, press freedom, and access to information can only be enjoyed when journalists and media practitioners are free from intimidation, pressure, and coercion. However, journalists continue to be subjected to threats and harassment, both on- and offline, in the execution of their work. Threats and attacks against the media not only jeopardise a person's right to freedom of expression, but also the rights of the public to receive and access information freely.



Source: ARTICLE 19, 'Acting on UN Human Rights Council Resolution 33/2 on the Safety of Journalists', accessible [here](#).

¹¹⁶ ACHPR, 'Resolution on the Safety of Journalists and Media Practitioners in Africa' (2011) (accessible [here](#)).

Although it is clear that what is required in the face of attacks on journalists is swift and firm justice, the reality is that many perpetrators commit criminal acts of violence against journalists and other members of the media with impunity.¹¹⁷ Impunity perpetuates a cycle of violence against journalists. When attacks against journalists go unpunished, this sends a public signal that the state and public authorities do not value the important role that the media plays in that country. As noted in the United Nations Plan of Action on the Safety of Journalists and the Issue of Impunity ([UN Plan of Action](#)),¹¹⁸ promoting the safety of journalists must not be constrained to after-the-fact action; instead, it requires prevention mechanisms and actions to address the root causes of attacks against journalists and impunity.

IMPLEMENTING THE HUMAN RIGHTS COUNCIL RESOLUTION ON THE SAFETY OF JOURNALISTS

Source: ARTICLE 19, 'Acting on UN Human Rights Council Resolution 33/2 on the Safety of Journalists' (2017) at p 10 ([accessible here](#)).

In 2016, the UN Human Rights Council adopted a landmark resolution on the safety of journalists. In it, states committed to prevent, protect, and prosecute in order to end impunity for violence against journalists. ARTICLE19, a leading human rights organisation focused on the right of expression, contends that this commitment requires states to take the following measures:

- **Duty to prevent:** States are required to create and maintain an enabling environment for journalists; ensure national laws do not interfere with journalists' independence; release arbitrarily arrested or detained journalists; not spy on journalists or intercept their communications; allow encryption and anonymity; protect journalists' confidential sources; train key stakeholders (including judges, law enforcement, military, journalists and civil society) on the states' international legal obligations and commitments on the safety of journalists.
- **Duty to protect:** States are required to publicly, unequivocally, and systematically condemn violence and attacks; establish early warning systems and rapid response mechanisms; regularly monitor and report on attacks against journalists; protect journalists covering protests and elections; protect media outlets against attacks and forced closure; protect journalists in armed conflict as civilians; recognise the role of media organisations in advancing safety.
- **Duty to prosecute:** States are required to adopt strategies to combat impunity; investigate; prosecute; ensure victims of crimes against journalists and their families have access to appropriate remedies; reinvigorate their efforts to effectively implement the international human rights framework on the safety of journalists.

In addition to the duties on states, the [International Declaration on the Protection of Journalists](#) by the International Press Institute, International News Safety Institute, Africa Media Initiative, and the Al Jazeera Media Network (2016) provides guidance for the role that media organisations themselves can play in implementing measures for the benefit of their journalists. This may include, for example, general safety training for all journalists; the development and implementation of procedures and tools aimed at ensuring the physical, psychological and digital safety and security of journalists; training for journalists on their rights and duties under national and international law; promoting public support for journalism and journalists; and building solidarity amongst journalists.

¹¹⁷ UNESCO, 'Legal standards on freedom of expression: Toolkit for the judiciary in Africa', (2018) at p 119 ([accessible here](#)).

¹¹⁸ United Nations, 'UN Plan of Action on the Safety of Journalists and the Issue of Impunity,' (2012) ([accessible here](#)).

SURVEILLANCE OF JOURNALISTS: AMABHUNGANE V MINISTER OF JUSTICE & OTHERS

[2021] ZACC (4 February 2021) at paras 115-120.

Protecting the communications of journalists, particularly between journalists and sources, is of crucial importance for defending press freedom. Surveillance not only threatens the safety of journalists and whistleblowers or sources, but can also have a wider chilling effect on freedom of expression. In a ground-breaking judgement in February 2021 in *amaBhungane v Minister of Justice & Others*, the Constitutional Court of South Africa confirmed the judgement of the High Court that sections of the Regulation of Interception of Communications Act (RICA) were unconstitutional to the extent that they infringed upon the right to freedom of expression and failed to provide sufficient safeguards for protecting, among other things, the need for journalists to maintain the confidentiality of their sources. The Court held that:

- “The confidentiality of journalists’ sources, which is crucial for the performance by the media of their obligations, is protected by section 16(1)(a) [of the Constitution.] (para. 115).”
- “In sum, the confidentiality of lawyer-client communications and journalists’ sources is particularly significant in our constitutional dispensation. There is thus a need that special consideration be given to this fact when interception directions are sought and granted (para. 119).”
- “RICA is thus unconstitutional to the extent that, when the intended subject of surveillance is a practising lawyer or a journalist, it fails to provide for additional safeguards calculated to minimise the risk of infringement of the confidentiality of practising lawyer and client communications and journalists’ sources (para. 120).”

2. Addressing gender-specific threats against women journalists

Gender-specific threats against women journalists should be interpreted to include all threats and attacks that are bias-motivated and are disproportionately experienced by women journalists, including sexual and gender-based threats such as rape and sexual assault.¹¹⁹ Reactions to women journalists are often more hostile, and certain threats are often particular to women journalists online, such as stalking.¹²⁰

Structural discrimination can also limit women journalists’ access to prevention and protection measures, both from the state and from employers, as well as access to justice.¹²¹ These factors “lead to a higher incidence of self-censorship amongst women journalists, the under-reporting of threats, and the denial of effective prevention, protection and prosecution, further contributing to a climate of impunity for gender-specific threats.”¹²²

It is important that any strategy for protecting the safety of journalists — whether by the state or within a media organisation — appropriately considers the gender dynamic of the forms of threat and harassment, as well as the frequency with which it occurs.

¹¹⁹ ARTICLE 19, ‘Acting on UN Human Rights Council Resolution 33/2 on the Safety of Journalists’ (2017) at p 10 (accessible [here](#)).

¹²⁰ *Id.* at p 10.

¹²¹ *Id.* at p 11.

¹²² *Id.* at p 11.

BROWN V ECONOMIC FREEDOM FIGHTERS**[2019] ZAGPJHC 166 (6 June 2019) at para 99.**

Online harassment of journalists using non-legal means is another too-often used method of stifling freedom of expression and dissent in Africa, and one that has a particularly gendered nature. The case of Karima Brown in South Africa is instructive in this regard. Brown, a journalist and talk-show host, received countless death and rape threats on social media after Economic Freedom Fighters leader Julius Malema posted her phone number online (known as doxing) in retaliation for what he believed was an attempt by Brown to surveil the EFF.¹²³

In its ruling, the High Court of South Africa ruled that Malema had breached the Electoral Commission Act that protects journalists from facing any harassment, intimidation, threats by political parties. In particular, the judge ruled that the EFF had failed to “instruct and take reasonable steps to ensure that their supporters do not harass, intimidate, threaten or abuse journalists and especially women”.¹²⁴

3. The protection of sources**BOSASA OPERATIONS (PTY) LTD V BASSON AND ANOTHER****[2012] ZAGPJHC 71 (26 April 2012) at paras 38 and 55.**

The right to source protection has been confirmed by the High Court of South Africa in *Bosasa Operations (Pty) Ltd v Basson and Another*, in which the court refused to order the journalist to reveal the identity of his source. Of relevance, the court stated as follows:

“[I]t is apparent that journalists, subject to certain limitations, are not expected to reveal the identity of their sources. If indeed freedom of the press is fundamental and *sine qua non* for democracy, it is essential that in carrying out this public duty for the public good, the identity of their sources should not be revealed, particularly, when the information so revealed, would not have been publicly known. This essential and critical role of the media, which is more pronounced in our nascent democracy, founded on openness, where corruption has become cancerous, needs to be fostered rather than denuded.

...

In the circumstances of this matter I find that the plaintiff has failed to prove that its right to a fair trial has been infringed. On the contrary, to order the defendants to reveal their sources would infringe their freedom of the press. Had it not been the defendants’ sources, the public’s right to know whether the plaintiff won the tender fairly would never have been known. The public would be poorer for it. The public interest will, in my view, be served by not revealing the identity of the defendants’ sources at this stage. The defendants have a valid objection to revealing their sources.”

Section 11 of the [Press Code of Ethics and Conduct for South African Print and Online Media](#) (Press Code) provides that the media must protect confidential sources of information and not publish information that constitutes a breach of confidence, unless the public interest dictates otherwise.

4. Digital security

As communications increasingly move online, the mitigation of risks for journalists in their daily work increasingly hinges on taking thorough, proactive steps to protect one’s digital security.

(i) Tips to improve your digital security

¹²³ Daily Maverick, Rebecca Davis. ‘EFF court losses mount as Karima Brown wins battle, but faces criticism of her own’ (2019) (accessible [here](#)).

¹²⁴ High Court of South Africa, Gauteng Division, Case No. 14686/2019 (accessible [here](#)).

There are a number of resources online that will assist with the necessary tips and tools for improving digital security. A useful, regularly updated resource is Tactical Technology Collective & Front Line Defenders, '[Security in a box: Digital security tools and tactics](#)'. This resource contains various guides covering digital security basics and identifying relevant tools, including on topics such as protecting your device from malware and phishing attacks; protecting your information from physical threats; using your smartphone as securely as possible; and protecting the sensitive files on your computer. Tactical Tech also publishes a '[Data Detox Kit](#),' which provides simple steps to control one's digital privacy, security and wellbeing. The Committee to Protect Journalists (CPJ) likewise published a [Digital Safety Kit](#) for journalists in 2019.

DIGITAL SECURITY CHECKLIST

- Have you backed up your devices (on hardware and/or the cloud)?
- Have you removed sensitive data from the device?
- Have you logged out of your accounts, apps and browsers, and not set them to remain logged in?
- Have you set up strong, unique passwords for all your accounts?
- Have you put a PIN lock or password on all devices?
- Have you encrypted your devices?
- Do you use encrypted messaging services?
- Have you set up two-factor authentication on all possible accounts?
- Have you set up your devices to remote wipe?
- Have you saved the relevant content from your messaging applications?

(ii) Tips to improve your social media security

Social media platforms give rise to various online attacks, including against journalists. This poses particular complications as it is not always possible to identify the person responsible. Journalists covering elections are increasingly likely to be targeted online through smear campaigns which aim to discredit them and their work. Attackers can be real people, but they can also be malicious computer bots: accounts that are run by computers rather than humans, and that mimic human behaviour on social media accounts as a way to spread misinformation or propaganda that support their cause.

While it is not always easy to identify a bot, sometimes it is possible to do so from the profile created — such as when it was created, whether it contains personal information or a photograph, a low number of followers with a high number of likes or retweets, or whether the name of the account and the handle match — to assess whether it is a human or a bot. Journalists may want to mute or block bots attacking them online, and should also report any malicious accounts to the social media platforms hosting these services.

The Committee to Protect Journalists (CPJ) notes that, in the event of an attack, journalists should try not to engage with the trolls as this can make the situation worse.¹²⁵ Journalists should report any abusive or threatening behaviour to the social media company, and document any comments or images that are of concern. It is also advisable to be vigilant for signs of hacking of your accounts, such as posts that you do not recognise, or changes in profile details, and ensure that there are adequate digital security measures to guard against this, such as strong passwords and two-factor authentication where available.

In light of the prevalence of online harassment, and the serious personal and professional impact that this can have on journalists, media outlets are encouraged to work with their journalists to put in place a plan of action in case trolling becomes serious. Journalists should also be provided with the necessary support and training to protect themselves from such attacks, and to deal with such attacks in the unfortunate event that they may arise.

¹²⁵ CPJ, 'Safety kit for journalists covering the South African election', (2019) (accessible [here](#)).

SOCIAL MEDIA CHECKLIST

- Do you have long and strong passwords for your accounts?
- Do you have a unique password for each account? (Tip: Consider using a password manager.)
- Have you turned on two-factor authentication for all accounts?
- Have you reviewed the privacy settings for each account to make sure that any personal data is removed?
- Have you removed any photos or images that could be manipulated and used as a way to discredit you?
- Have you spoken with family and friends about removing photographs of you from their profiles or locking down their accounts?
- Have you considered getting your account verified by the social media company to identify your account from fake accounts set up in your name?
- Are you monitoring your accounts for signs of increased trolling activity or for indications that a digital threat could become a physical one?
- Have you taken care not to post about your live location until after you have left the area?

5. Assistance and recourse for journalists under threat during the upcoming elections

An attack against a journalist — whether physical or verbal, whether online or offline — is a serious concern, and requires swift and effective action to deal with it accordingly. There are a number of different options available to journalists to seek assistance and recourse for any threats or attacks made against them.



As a point of departure, SANEF will be documenting threats and violence against journalists through an online resource via the SANEF elections portal. This data will be collated and used in order to work towards developing strategies and approaches to protect the safety journalists, and there may be appropriate circumstances in which SANEF will intervene. In addition, various organisations may be able to provide support and advice to journalists, including the Committee to Protect Journalists (CPJ) and Media Monitoring Africa (MMA).

INITIATIVES BY SANEF

As mentioned above SANEF has developed a dedicated resource for this purpose, accessible here: <https://elections.sanef.org.za>.

While we cannot undertake to assist in every incident, we can seek to provide the following assistance:

- Once evidence is submitted from a journalist, we will, where possible, investigate and leverage relationships with the social media platforms to help expose and or sanction those responsible for carrying out the threats.
- The Independent Electoral Commission (IEC) will, where possible, be notified of the incident, so they may, if necessary, ask the relevant authorities to investigate as well. If, for example, hate speech is also evident, it may be reported to the South African Human Rights Commission, or if gender-based it may also be submitted to the Commission on Gender Equality.

While we cannot guarantee that the perpetrators will be identified, it is hoped that by offering the option to report it will allow SANEF not only to capture and record the incidents, but will also help raise public awareness of the importance of journalism.

In addition to following the approach above, the **Independent Electoral Commission (IEC)** may also be approached directly with any matter that falls within its jurisdiction as a contravention of the electoral law framework. For example, as noted above, section 8 of the Electoral Code of Conduct (Electoral Code) requires candidates to respect the role of the media during elections, including by not preventing members of the media from accessing public political meetings, marches, demonstrations, and rallies. It also requires every party and candidate to take all reasonable steps to ensure that journalists are not subjected to harassment, intimidation, hazard, threat, or physical assault by any of their representatives or supporters. In the event that a party or candidate does not adhere to these provisions, this should be brought to the attention of the IEC as a breach of the Electoral Code.

A complaint may also be lodged with the **South African Human Rights Commission (SAHRC)** in accordance with the Complaints Handling Procedures.¹²⁶ The SAHRC can investigate any alleged violation of human rights, either on its own initiative or on receipt of a complaint, and has a wide discretion to decide whether to investigate a complaint or not. Another Chapter 9 institution, the **Commission for Gender Equality**, may also be approached in appropriate circumstances with a gender-based claim falling within its mandate.

The **Equality Court** can also be approached for recourse for harassment. Section 11 of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (Equality Act) states that “[n]o person may subject any person to harassment”, per the definition of harassment in section 1 of the Equality Act.¹²⁷ Notably, the South African Human Rights Commission is permitted to institute legal proceedings under the Equality Act in its own name or on behalf of a person or group of persons.¹²⁸

A claim for **civil damages** may also be brought for other forms of harm suffered. For example, a civil claim for defamation can be brought by a journalist against a person who has maliciously spread false information about him or her. There are various legal practitioners in South Africa who can be approached for assistance, and the Legal Practice Council maintains a full list of registered legal practitioners in the country. In the event that a journalist or media organisation cannot afford to pay for legal fees, there are also public interest organisations that may assist, as well as other legal practitioners who may be willing to assist on a *pro bono* basis. Media Defence, formerly the Media Legal Defence Initiative, may also be approached

¹²⁶ South African Human Rights Commission, ‘Complaints Handling Procedures’, (2018) (accessible [here](#)).

¹²⁷ Harassment is defined in section 1 of the Equality Act as unwanted conduct which is persistent or serious and 40 demeans, humiliates or creates a hostile or intimidating environment or is calculated to induce submission by actual or threatened adverse consequences, and which is related to sex, gender or sexual orientation, or to a person’s membership or presumed membership of a group identified by one or more of the prohibited grounds or a characteristic associated with such group.

¹²⁸ Section 20(1)(f) of the Equality Act.

for possible assistance, as its mandate is to provide legal help for journalists, bloggers, and independent media around the world.¹²⁹

An **interdict** is an important tool that can be relied on to stop certain conduct from persisting. An interdict — whether temporary or final — is an order of court, and is therefore binding on the person or entity that it is granted against, subject to it being discharged. There are four requirements that must be met for an interim interdict: (i) the applicant must have a clear *prima facie* legal right; (ii) the applicant must have a well-grounded basis for believing it will suffer irreparable harm if the interdict is not granted; (iii) the balance of convenience must favour the applicant; and (iv) there must be no alternative remedy available to the applicant.¹³⁰

Once an interim interdict is granted, a court date will be allocated on which the parties wanting to oppose the relief can argue against why the interim interdict should not be made final. If no one appears on the return date, the interim interdict is made final; if it is opposed, the matter may be postponed and argued fully at a later date. While the case is ongoing, the interim interdict typically remains in force.

SOUTH AFRICAN NATIONAL EDITORS' FORUM AND OTHERS V BLACK LAND FIRST AND ANOTHER

[2017] ZAGPJHC 179 (7 July 2017) at para 29.

In *South African National Editors' Forum and Others v Black Land First and Another*, the High Court granted an interdict in favour of the media broadly, prohibiting the respondent from: "engaging in any of the following acts directed towards the applicants: Intimidation; Harassment; Assaults; Threats; Coming to their homes; or acting in any manner that would constitute an infringement of their personal liberty", and from "making any threatening or intimidating gestures on social media ... that references any violence, harm and threat". The court subsequently held the respondent in contempt of court for continuing to engage in certain activities, including the harassment of members of the media, following the interdict having been granted.

A **protection order** may also be obtained in terms of the Protection from Harassment Act 17 of 2011. The provisions regarding an application for a protection order are set out in section 2. Section 3(2) states that the court must issue an interim protection order against the respondent — without notifying the respondent of the proceedings — if it is satisfied that there is evidence of the following: (i) the respondent is engaging or has engaged in harassment; (ii) harm is being suffered by the complainant or a related person as a result of that conduct or will be if a protection order is not issued immediately; and (iii) the protection accorded by the interim protection order is likely not to be achieved if the respondent is given prior notice. Once an interim protection order has been issued, this must be served on the respondent by the clerk of the court, sheriff or peace officer identified by the court.¹³¹ Section 9 of the Protection from Harassment Act sets out the provisions for the final granting of a protection order.

¹²⁹ Accessible here: <https://www.mediadefence.org/>.

¹³⁰ For more, see *Brown v EFF* (accessible [here](#)) and *SANEF v EFF* (accessible [here](#)).

¹³¹ Section 3(3) of the Protection from Harassment Act.

SECTION 4 OF THE PROTECTION FROM HARASSMENT ACT

(accessible [here](#)).

Of particular relevance to online harassment, section 4 provides that if a court is satisfied that a protection order must be issued as a result of harassment that has taken place over electronic communications or e-mail, and the identity of the respondent is not known, the court may issue a direction to an electronic communications service provider directing that it furnish the court with the following information on affidavit:

- The electronic communications identity number from where the harassing electronic communications or electronic mail originated.
- The name, surname, identity number and address of the respondent to whom the electronic communications identity number has been assigned.
- Any information which indicates that electronic communications or electronic mail were or were not sent from the electronic communications identity number of the respondent to the electronic communications identity number of the complainant.
- Any other information that is available to an electronic communications service provider that may be of assistance to the court to identify the respondent or the electronic communications service provider which provides a service to the respondent.

Lastly, it must be emphasised that in the event that a member of the media is facing any form of threat or violence, this must be reported to the **South African Police Service (SAPS)** as a matter of urgency, as the appropriate authority tasked with handling criminal matters. This can be done in conjunction with the other options set out above, as appropriate. All members of the media are encouraged to prioritise their safety and the safety of those around them, put in place necessary measures for protection, and seek appropriate assistance from colleagues, friends and family, and the designated bodies that can assist.

6. COVID-19 protection

Given that the 2021 Municipal Elections will be taking place during the COVID-19 global pandemic, it is necessary for journalists to take precautions to protect themselves, both in terms of the physical risks of transmission involved in engaging with the public and sources, and in relation to unusual regulations that have been put in place to manage the pandemic, such as social distancing requirements and lockdown regulations.

SANEF has published a set of [working and reporting guidelines for journalists](#) during the pandemic. The guidelines include recommendations for journalists to reduce their risk of infection, questions to ask an employer or their workplace, and guidance for specific situations journalists are likely to find themselves in in the course of their work.

Because the consequences of COVID-19 have been gendered in terms of their economic and social effects, SANEF has also produced a [guide to gender-aware reporting on COVID-19](#), which outlines the ways in which the pandemic is disproportionately affecting women and girls, and how to report responsibly while taking this into account.

One development that has become considerably more common during the COVID-19 pandemic and related lockdowns around the world is that of police brutality towards residents seen to be violating the strict regulations put in place to manage transmission of the disease. This has likewise affected journalists covering COVID-19 or unrelated topics during the lockdown periods. While harassment of the media is unacceptable, there are steps journalists can take to protect themselves in these situations by dealing carefully with reports of police brutality and other wrongdoing. SANEF's guidance [here](#) may be useful in this regard.

Finally, it is important to be familiar with the [rules that the South African Police Service must follow when dealing with journalists](#), which include, for example, that although the media may be prohibited in terms of Section 69 of the South African Police Service Act from publishing certain images, "a media representative may not be prohibited from taking photographs

or making visual recordings” by any SAPS member. This includes photographs of police officers themselves. SAPS members also may not wilfully damage the camera, film, recording or other equipment of a media representative.

7. Suggested resources

- ARTICLE 19, ‘Acting on UN Human Rights Council Resolution 33/2 on the Safety of Journalists’ (2017) (accessible [here](#)).
- CPJ, ‘Safety kit for journalists covering the South African election,’ (2019) (accessible [here](#)).
- International Declaration on the Protection of Journalists (accessible [here](#)).
- Tactical Technology Collective & Front Line Defenders, ‘Security in a box: Digital security tools and tactics’, accessible here: <https://securityinabox.org/en/>.
- UN Plan of Action on the Safety of Journalists and the Issue of Impunity (accessible [here](#)).
- UNESCO, ‘Director-General report on the safety of journalists and the danger of impunity’, (2018) (accessible [here](#)).
- UNESCO, ‘Legal standards on freedom of expression: Toolkit for the judiciary in Africa’, (2018) (accessible [here](#)).



MODULE V

MUNICIPAL FINANCE

2021

MUNICIPAL ELECTIONS



MODULE V | MUNICIPAL FINANCE

Overview of this module

- A definition of municipal finance, and why proper controls are essential for effective, accountable local government.
- The legal and regulatory framework for municipal government in South Africa, and how it fits into democracy and developmental goals.
- The funding and division of revenue for municipalities.
- The current state of municipal finances in South Africa.
- Advice for journalists reporting on municipal finances.

1. What is municipal finance?

Local government finance is a key part of the three-tier democratic system of the Republic of South Africa – national, provincial, and local – established by the Constitution.

“Interest in cities around the world is on the rise, in large part, because more and more people are living in cities in both developed and less developed countries. The rapid increase in the urban population has put pressure on local governments to provide a range of services from water and sewer infrastructure to social services and housing. To meet the rising demands of urbanization, municipalities need adequate revenue tools to pay for services and infrastructure.”¹³²

This quote from UN Habitat provides a compelling justification for the importance of municipal finance, and why it is an issue of social, developmental and political relevance. Municipal finance can be defined as the revenue expenditure decisions of municipal governments. This covers the sources of revenue, the financing of infrastructure, public-private partnerships, expenditures at the local level, and accountability for these decisions, including the budgeting process and financial management.

Around the world, there have been some common trends in municipal finance in recent years, including:¹³³

- Fiscal decentralisation, the transfer of financial responsibility from central governments to local governments, particularly to deliver core services.
- Growing emphasis on land and property taxation.
- Increasing prevalence of public-private partnerships.
- Increased demands for accountability and transparency at the local level.
- Greater pressure for better municipal financial management.

According to dominant economic theory, the primary role of municipal governments is to provide services to residents in a particular geographic area. Local governments do not, for example, substantially take on stabilisation policy or income redistribution because they do not have access to monetary tools, and because capital and labour flow freely across sub-national borders, which would significantly complicate such efforts. In line with the “subsidiarity principle,” many economists argue that the efficient provision of services is best ensured when decision-making is carried out by the level of government that is closest to the individual citizen.¹³⁴

This provides a strong justification for the trend of fiscal decentralisation mentioned above, and is also relevant in the South African context where many core services have been devolved to municipal governments. Understanding municipal finance is therefore a crucial factor in evaluating the performance of government, interrogating service delivery, and uncovering corruption or misappropriation.

¹³² UN Habitat, ‘Guide to Municipal Finance,’ (2009) p 1 (accessible [here](#)).

¹³³ Ibid, p 14-16.

¹³⁴ Ibid, p 17.

Local government is envisaged in the 1998 “White Paper on Local Government” as being a form of decentralized government that is developmental, in pursuit of creating a “better life” for all South Africans.¹³⁵ To enable this developmental purpose and roll back underinvestment in infrastructure in townships and rural areas designated as black areas under apartheid and ‘bantustans’ or so-called ‘homelands’, the constitutional framework demands that an “equitable share” of all government revenue be set aside for provinces and local government, particularly to subsidise basic services. Municipalities can also cross-subsidise between high and low-income consumers of services. The Municipal Systems Act of 2000 stresses in its preamble that the Constitution demands local government not just provide services to all citizens but “be fundamentally developmental in orientation”.¹³⁶

2. Legal framework for municipal finance

Much effort has gone into reforming and putting in place governance structures since 1996, and several pieces of legislation have been enacted specifically affecting local government finance.

The primary law regulating the operations of municipalities in South Africa is **the Local Government: Municipal Finance Management Act 56 of 2003 (MFMA)**. The purpose of the MFMA is to secure the sound and sustainable management of the financial affairs of municipalities and related entities, and to establish treasury norms and standards for the local sphere for government. Importantly, the MFMA aims to foster transparency by mandating budget and reporting requirements. The MFMA also aims to modernise budget, accounting and financial management processes to enable municipalities to deliver services to communities in the best possible way, and to clarify and separate the roles and responsibilities of the council, mayor and officials in the interest of good governance.¹³⁷

The five Principles of the MFMA are:

- Promoting sound financial governance by clarifying roles;
- Adopting a more strategic approach to budgeting and financial management;
- Promoting cooperative government;
- Modernise of financial management; and
- Promoting sustainability.

The MFMA principles aim to achieve a number of reforms, the most significant of which are the new budget process which is linked to the Integrated Development Plans (IDPs) — five year strategic plans to guide the governance of the municipality — as well as the new accounting standards and formats, the establishment of audit committees and other internal controls, improvements to procurement and supply chain management, performance measurement reporting, staff competency levels and new mechanisms to resolve financial problems and misconduct.

It is also worth noting a number of government gazettes and regulations which support local government in interpreting and implementing the MFMA:

- **Gazette No 27431, April 2005:** assists municipalities to implement Public-Private Partnership provisions for effective and efficient service delivery;
- **Municipal Supply Chain Management Regulations – Gazette 27636, 30 May 2005:** assist municipalities to implement Chapter 11 of the MFMA on goods and services in an open, fair and transparent manner for an efficient and effective procurement system;
- **Municipal Regulations on debt disclosure – Gazette No 29966, 15 June 2007:** assist municipalities to implement MFMA Chapter 6 on debt in a more efficient and responsible manner while ensuring that the municipality will sustain and maintain the debt incurred;
- **Municipal Regulations and Guidelines on Minimum Competency Levels – Gazette 29967, 15 June 2007:** assist and guide municipalities to implement MFMA sections 83, 107, 117 and 119 on competency levels by appointing

¹³⁵ RSA, 'The White Paper on Local Government' (Republic of South Africa, 1998).

¹³⁶ RSA, 'Municipal Systems Act,' 21776 § (2000).

¹³⁷ National Treasury, 'MFMA,' n.d., <http://mfma.treasury.gov.za/Pages/Default.aspx>.

appropriately competent municipal officials charged with financial management responsibilities against key positions;

- **Municipal Asset Transfer Regulations – Gazette No. 31346, 22 August 2008:** assist municipalities to manage and account for the asset transfer process in line with the issued reforms while ensuring that assets that are immediately needed for service delivery purposes are not disposed of unduly;
- **Municipal Budgeting and Reporting Regulations:** assist municipalities to budget in line with MFMA Chapter 4, ensures that the budget is funded and maintains uniformity in the budgeting process of municipalities, and facilitates ease of interpretation across municipalities on similar areas of the budgeting process.
- **Municipal Regulations on Standard of Chart of Accounts:** assist municipalities to have a functional financial management system that includes rigorous internal controls and improves transparency and accountability;
- **LG Regulations on Financial Misconduct and Criminal Proceedings:** assist municipalities to implement MFMA Chapter 15, identify, process to manage and institute criminal proceedings for any financial management misconduct.

The **Intergovernmental Fiscal Relations Act (No.97 of 1997) (IFRA)** manages intergovernmental relations, defined as the relationships between the three spheres of government. Assented to in terms of General Notice 1652 on 17 December 1997 and published in the Government Gazette (Vol.390, No.18512) the same day, the IFRA took effect on 1 January 1998.

The **Intergovernmental Relations Framework Act (hereafter, IGRFA)** was assented to on 15 August 2005. The intention of the act is to bring structure and form to the constitutional principles of cooperative government. The basis of cooperative government is a multi-sphere system of government within which each sphere exercises distinctive powers and functions operating with principles of interdependence and inter-relatedness.

The IFRA prescribes the process for determining the equitable sharing and allocation of revenue raised nationally. Sections 9 and 10(4) of the IFRA set out the consultation process to be followed, including considering recommendations made regarding the equitable division of nationally raised revenue. Part I provides for the establishment and functions of a budget council and Part 2 provides for the establishment and functions of a local government budget forum. Part 3 gives effect to section 214(1) of the constitution. This relates to revenue sharing among the spheres of government and to the Division of Revenue Bill which the Minister of Finance must introduce in parliament every year.

The **Division of Revenue Act (No.28 of 1998) (DORA)** aims to give effect to section 214(1) of the constitution, which says that every year a Division of Revenue Act must determine the equitable division of nationally raised revenue between national government, the nine provinces and 257 municipalities. This budget process takes into account the powers and functions given to each sphere of government.

The Purpose of DORA is to:

- Determine the share of each sphere of government of the revenue raised nationally for the relevant financial year;
- Determine any other allocations to the provinces, local government or municipalities from the national government's share of that revenue, and any conditions on which those allocations are or must be made.

The **Local Government: Municipal Property Rates Act 6 of 2004** regulates the power of a municipality to impose property taxes, provides for valuation methods on properties, and for the system of exemptions, rebates and reductions.

The **Local Government: Municipal Systems Act 32 of 2000** (Municipal Systems Act) provides a framework for planning, performance management systems, effective use of resources, and organisational change. Notably, it establishes a system for municipalities to report on their performance, and a mechanism for residents to compare the performance of their municipality against others. It also regulates public-private partnerships. The Act requires municipalities to prepare and formally adopt IDPs, the five-year strategic plans that are reviewed annually in consultation with communities and other stakeholders with the objective of achieving service delivery and development goals in municipal areas.¹³⁸

It is also important to note that section 5 of the Municipal Systems Act gives local communities the right to contribute to the decision-making process of the municipality. Section 16 further requires municipalities to encourage and create the

¹³⁸ Municipalities.co.za, 'The Local Government Handbook South Africa 2021,' p 15 (accessible [here](#)).

conditions for community participation, and to establish the appropriate mechanisms, processes and procedures to enable local communities to participate in the affairs of the municipality. Furthermore, and of relevance to journalists, section 20 of the Municipal Systems Act provides for the admission of the public and the media to meetings of a municipal council, which may not bar members of the public or the media except in specific circumstances.

The **Local Government: Municipal Systems Amendment Act 44 of 2003** aims to align the systems of municipal administration and human resource management with those of the Public Service in national and provincial government.

Finally, the **Local Government: Municipal Structures Act 117 of 1998** provides for ward committees and their responsibilities. Ward committees are a mechanism for citizens to get involved in how their communities are governed, by providing a vital link between ward councillors, the community, and the municipality. They also play an important role in fostering relations between ward councillors and other stakeholders such as traditional councils and community development workers. The terms of ward committees are aligned to those of municipal councils.¹³⁹

Finally, various institutions play an important role in supporting local government and facilitating relationships between various levels of government. One of the most important in this regard is the Department of Cooperative Governance and Traditional Affairs (COGTA), whose mission is to “ensure that all municipalities perform their basic responsibilities and functions consistently by:

1. Putting people and their concerns first;
2. Supporting the delivery of municipal services to the right quality and standard;
3. Promoting good governance, transparency and accountability;
4. Ensuring sound financial management and accounting; and
5. Building institutional resilience and administrative capability.”¹⁴⁰

COGTA’s mandate stems from Chapters 3, 7 and 12 of the Constitution, which deal with the system of cooperative governance, local government, and traditional leaders, respectively. COGTA runs numerous programs relating to municipal governance, such as the Integrated Urban Development Framework (IUDF), which “seeks to foster a shared understanding across government and society about how best to manage urbanisation and achieve the goals of economic development, job creation and improved living conditions for our people.”

National Treasury also plays an important role in municipal finance, because it is empowered by the Constitution¹⁴¹ to determine the financial management framework of all organs of state in all spheres of government.¹⁴² Treasury not only implements the budget, but also plays an oversight role over municipal governments and is responsible, together with provincial treasuries, for administering the MFMA, the central piece of legislation regulating municipal finance. In terms of the MFMA, National Treasury may take appropriate steps, including the stopping of funds to a municipality if it commits a serious or persistent material breach of applicable legislation and regulations. Provincial treasuries, on the other hand, are responsible for monitoring compliance with the MFMA and assisting municipalities with preparing their budgets, among other things.

National Treasury is the repository of a host of information about municipal finance, including both guidance about how best to achieve sound management and also of actual, up-to-date financial information. The Budget Review also contains essential information about the finances of local government.

The Auditor-General (AG) likewise plays a crucial role in municipal financial management. The AG’s office is established by Chapter 9 of the constitution as the Supreme Audit institution of South Africa, and its purpose is to strengthen the country’s democracy by enabling oversight, accountability and governance in the public sector through auditing. Its auditors must do their work “without fear, favour, or prejudice on how government uses public assets”.¹⁴³ In terms of the Constitution, the AG must audit and report on the accounts, financial statements and financial management of all municipalities as well as

¹³⁹ Cooperative Governance and Traditional Affairs, ‘Municipal Ward Committees: What You Need to Know,’ (20 March 2020) (accessible [here](#)).

¹⁴⁰ Ministry of Cooperative Governance and Traditional Affairs, ‘About Cooperative Governance and Traditional Affairs,’ (accessible [here](#)).

¹⁴¹ Sections 215 and 216 and other provisions of Chapter 13 of the Constitution.

¹⁴² Municipalities.co.za, ‘The Local Government Handbook South Africa 2021,’ p 15 (accessible [here](#)).

¹⁴³ AGSA, ‘2019-20 Integrated Annual Report of the Auditor General of South Africa’ (2020) at p 11 (accessible [here](#)).

national departments and other entities as required by law.¹⁴⁴ It issues audit reports on municipalities every year as well as aggregated reports on the outcome of its audits of municipalities annually.

Finally, the South African Local Government Association (SALGA), is a listed public entity established in terms of Section 21 of the Companies Act 61 of 1973. SALGA serves to represent local government on intergovernmental forums, such as the Budget Forum and the National Council of Provinces (NCOP). SALGA is funded through various channels, including a national government grant, membership fees from provincial and local government associations, and donations from the community.¹⁴⁵

INTEGRATED DEVELOPMENT PLANNING (IDPS)

Municipalities.co.za, 'The Local Government Handbook South Africa 2021,' p 15 (accessible [here](#)).

IDPs are important components of municipal accountability and transparency. They also provide opportunities for residents and affected stakeholders to input into local governance and understand how to participate in local decisions that affect them.

According to section 26 of the Municipal Systems Act, IDPs must include the following aspects:

- The municipal council's vision for the long-term development of the municipality.
- An assessment of the existing level of development in the municipality and an identification of communities that do not have access to basic municipal services.
- The council's development priorities and objectives, including its local economic development aims and its internal transformation needs.
- The council's development strategies, which must be aligned with any national or provincial sectoral plans and planning requirements.
- A spatial development framework.
- The council's operational strategies.
- Applicable disaster management plans.
- A financial plan and budget projection for the next three years.
- Key performance indicators and performance targets.

OVERSIGHT PROCESSES

Tool/Mechanism	Time-Frame
IDP	5-year plan
Budget	3-year plan
Service Delivery and Budget Implementation Plan (SDBIP)	Annual plan
Implementation Monitoring	In-year reporting
Accountability Reporting	Annual Financial Statements
Annual Report	Annually

¹⁴⁴ "Constitution of the Republic of South Africa" (1996).

¹⁴⁵ Municipalities.co.za, 'The Local Government Handbook South Africa 2021,' p 16 (accessible [here](#)).

3. Municipal revenue

The freedom of municipalities to set their own budgets – with input/guidelines/supervision from central government – should be what gives effect to the popular will at the local government level, along with passing bylaws and planning. Municipalities should be able to spend on what the residents of the municipality deem important to the extent that it is affordable in terms of the revenue-raising ability of the municipality. While municipal officials are responsible for budgeting and reporting on budgets, the municipal councillors are responsible to the electorate through regular elections for how the money is spent or misspent.

The freedom to set budgets is not absolute and in any case most municipal treasuries face similar demands, for public facilities like sports centres and housing, but most importantly for infrastructure — roads, pipes for reliable and affordable running water and sewerage, distribution stations and reticulation for electricity supply and trucks and dumps for refuse removal. A new infrastructure demand is internet connectivity. Municipalities must also make provision for free basic services for indigent residents, and must pay the wholesalers of services, for instance Eskom for electricity, to pass on to the residents — to which municipalities add their own mark-up to raise revenue.

Municipalities are responsible for delivering basic services such as water, electricity, sanitation and solid waste removal, and for the provision of public road networks, and some public transport services.¹⁴⁶ They also manage some planning and regulatory systems related to land use, infrastructure roll-out, and economic activity. Other services they are responsible for include firefighting, parks and recreational areas and libraries, and other facilities.

The municipality has to raise revenue to supply these services, pay its workers and managers, and shoulder other responsibilities, part of which is obtained through constitutionally-mandated divisions managed through the Division of Revenue Bill, which is tabled each year with the national budget.¹⁴⁷ Local government receives transfers through the equitable share and through conditional grants. The equitable shares are determined through formulas based on demographic and developmental factors — such as the size of its low-income population, the cost of basic services and how much of its own revenue it can raise¹⁴⁸ — with input from the Financial and Fiscal Commission and in consultation with municipalities, provision for which is made in the Constitution. Conditional grants are designed to meet specific objectives, and are — as indicated by the name — conditional on municipalities meeting certain objectives,¹⁴⁹ and on an accepted business plan for the grant's use.¹⁵⁰ In the 2019/20 year, transfers to municipalities accounted for roughly 8,5% or R125 billion of nationally raised revenue.¹⁵¹

There are a number of different ways to classify the revenue that municipalities receive from national government. For example, there is a differentiation between current transfers for financing current expenditures — which includes the equitable share, capacity-building grants, the Expanded Public Works Programme (EPWP) Integrated Grant, and disaster relief or emergency grants — and infrastructure grants intended to finance capital works — such as the Informal Settlements Upgrading Partnership Grant and Public Transport Network Grant. It is important to note that the way transfers are reflected on the financial statements of municipalities can differ, and can make quite significant changes to those statements. For example, the general fuel levy is one item that is often treated differently by municipalities in their financial reporting, and which may therefore affect the appearance of revenues and transfers.¹⁵²

¹⁴⁶ *Ibid.*

¹⁴⁷ Section 227 of the Constitution.

¹⁴⁸ Lungile Penxa, 'The Appropriate Use of the Equitable Share Allocation,' NPO, Public Service Accountability Monitor (2018) (accessible [here](#)).

¹⁴⁹ Municipalities.co.za, 'The Local Government Handbook South Africa 2021,' p 16 (accessible [here](#)). For more on how equitable shares are calculated, see p 58-64 of the South African Cities Network report 'State of City Finances 2020,' (2020) (accessible [here](#)).

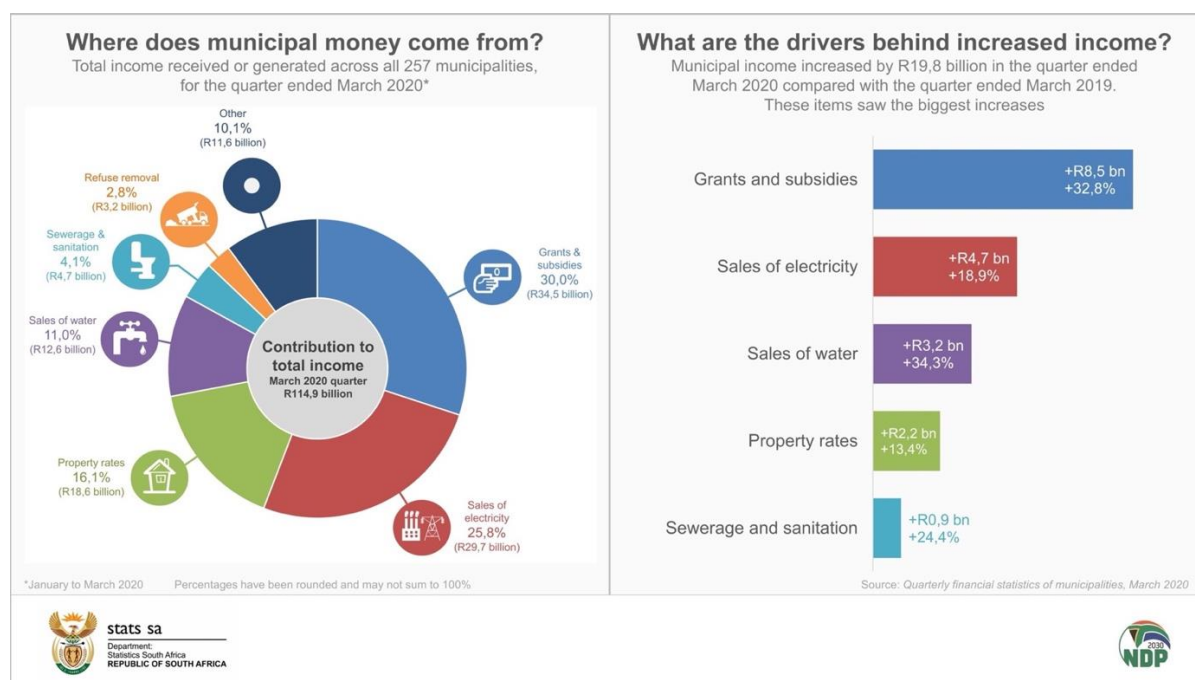
¹⁵⁰ Fritz Jooste and Alison Tshangana, 'Engaging with Government Budgets - An Activist's Guide to South African Government Budgets at Local, Provincial and National Level,' Centre on Budget and Policy Priorities, (2012) at p 8 (accessible [here](#)).

¹⁵¹ *Ibid.*

¹⁵² South African Cities Network, 'State of City Finances 2020,' (2020) p 16 (accessible [here](#)).

There are generally four types of conditional grants that municipalities receive:

1. General grants to supplement numerous programmes partially funded by municipalities;
2. Grants that fund certain responsibilities and programmes implemented by municipalities;
3. Grants that provide in-kind allocations through which a national department implements projects in municipalities; and
4. Grants that allocate and transfer funds to help a municipality deal with a disaster or housing emergency.¹⁵³



Source: StatsSA, 'An Update to Municipal Spending and Revenue (March 2020)', accessible [here](#).

Municipalities can be allowed to roll over grant amounts that are not spent in a municipal year if the unspent allocations are committed to identifiable projects. Otherwise, conditional grants not spent at the end of the municipal financial year must go back to the National Revenue Fund. Recently, Treasury has become uncompromising about grants. In March 2020 Treasury stopped grants to 47 municipalities for not spending grants or not complying with grant conditions and reallocated the funds to municipalities which can spend them.¹⁵⁴

Municipalities spent only 68% of the R32-billion in specific purpose conditional grants in 2019/20, mainly because Covid-19 restrictions limited construction and maintenance work. The percentage was 80% the previous year. However, in normal times underspending or not spending grant money, or spending money on what was not allocated for, is an indicator of poor financial management and should be investigated as a possible story.¹⁵⁵

Local governments also raise revenue through property rates, user charges for municipal services rendered, and other local taxes. Only about a quarter of municipalities' revenue comes from the division of revenue, though this proportion is lower in rural and poorer areas where municipalities have much lower tax bases. As a result, these rural and poorer municipalities receive a higher per-capita share of transfers. In fact, "the most rural municipalities receive around twice the allocation per household that metros do."¹⁵⁶ On the other side of the spectrum, eThekweni generated the highest proportion of earned

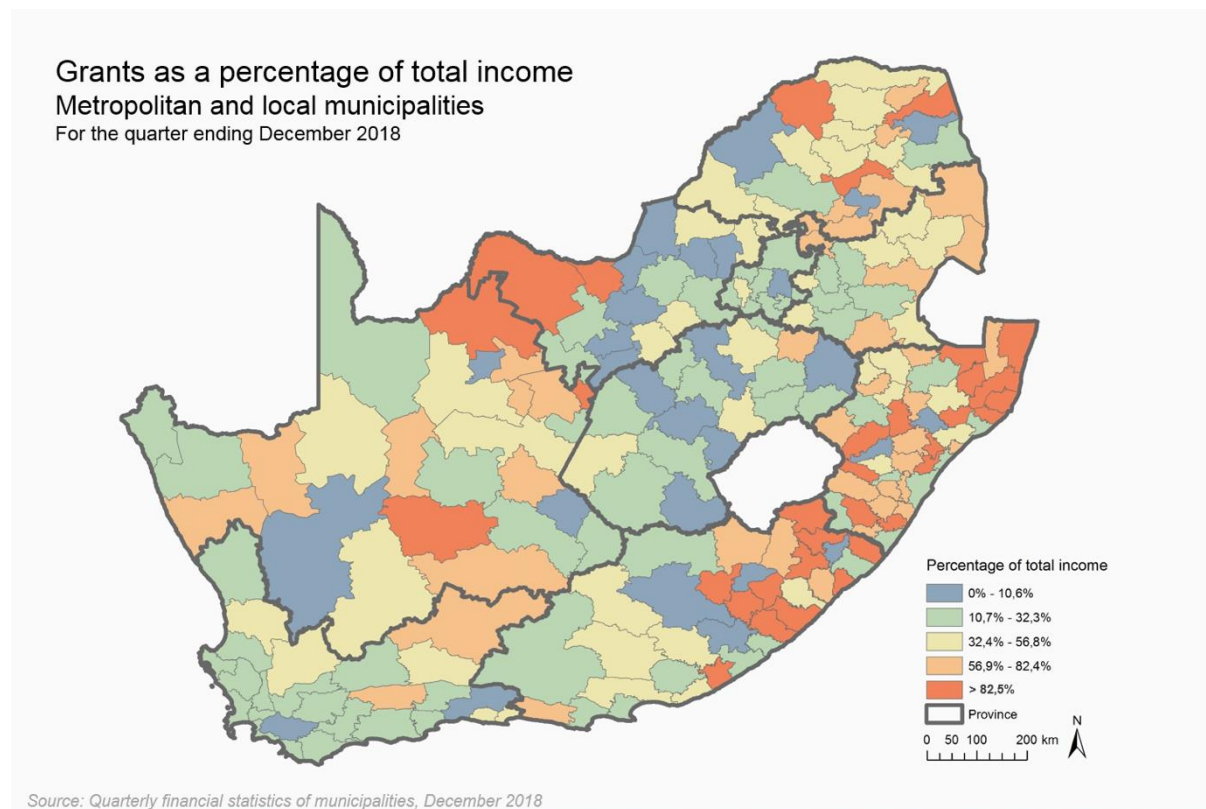
¹⁵³ Ibid, at p 18.

¹⁵⁴ Reg Rumney, 2021.

¹⁵⁵ Ibid.

¹⁵⁶ National Treasury SA, 'The State of Local Government Finances and Financial Management as at 30 June 2019 - Audit Outcomes of the 2018/19 Financial Year, Analysis Document,' National Treasury, Republic of South Africa, (2020) at p 6.

revenue out of total revenue in 2020, at 83%.¹⁵⁷ In recent years, as the growth rate of revenue from services has slowed, the proportion of property rates as a share of municipalities' earned income has increased.

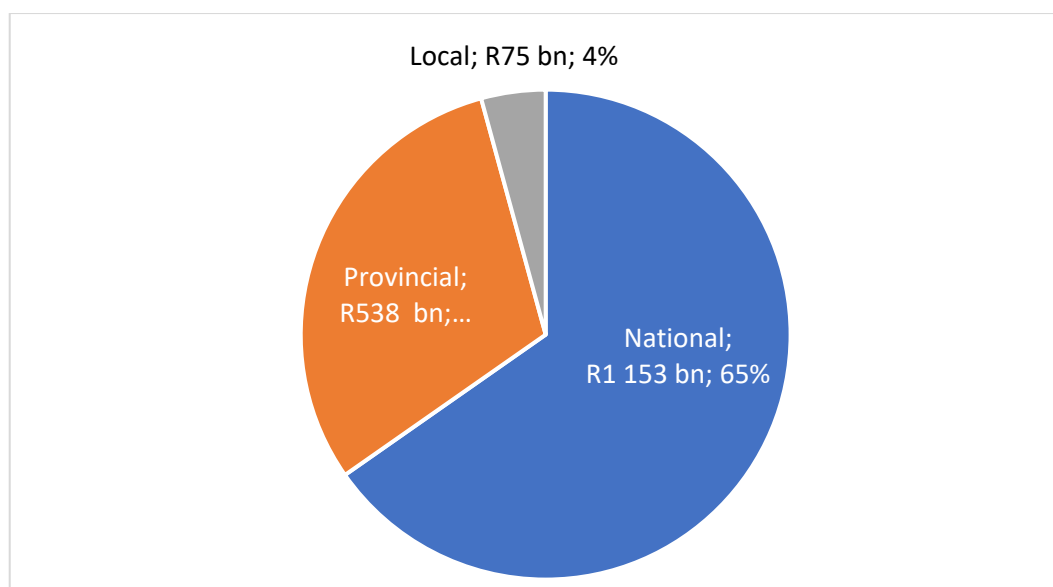


THE SOUTH AFRICA I KNOW, THE HOME I UNDERSTAND

Source: StatsSA, 'How financially independent are municipalities?' (28 March 2019) accessible [here](#).

Most of the equitable share still goes to national and provincial government, with local government receiving 4% to 5% of national revenue in the equitable share and a further 4% to 5% in conditional grants, so that local government receives in total 9% to 10% every year of all available revenue.

¹⁵⁷ South African Cities Network, 'State of City Finances 2020,' (2020) p 9 (accessible [here](#)).



Source: Division of Revenue Bill 2020/21 accessible [here](#).

As the South African Cities Network (SACN) points out, “[c]ities are finding it increasingly difficult to raise sufficient revenue to cover their mandates, mainly as a result of structural issues within the local government fiscal framework (LGFF) and the deteriorating macro-economic environment in which they operate – both matters over which cities have little control.”¹⁵⁸ SACN is a network of South African cities (currently numbering 8 member cities) and partners (including national government departments and SALGA) that encourages the exchange of information, experience and best practices on urban development and city management. SACN notes that while fiscal space has been shrinking for some years as a result of demographic shifts, reduced margins, and the economic downturn, the COVID-19 pandemic has only accelerated these challenges for municipalities in 2020 and 2021, the consequences of which are likely to linger for some years.

Cities have to raise revenue, through national government transfers and rates and taxes, in order to cover operating expenditure incurred by their constitutional responsibility to provide services to households and businesses within their boundaries. According to section 15 of the MFMA, municipalities may only spend in terms of an approved budget, as spending outside the budget constitutes unauthorised expenditure.

4. Municipal expenditure

While the fiscal environment for municipalities continues to shrink, as detailed above, operating expenditure is predicted to increase over the short term as local governments attempt to respond to the COVID-19 pandemic. Bulk purchases of electricity from Eskom and water from the various water boards continue to be the largest expenditure items for most cities.¹⁵⁹ Municipalities make money from the difference between the costs of buying electricity from Eskom and the price charged to consumers. They also have to maintain the municipal grid and administer sales. The cost of electricity has surged as the wholesaler Eskom has pressed the regulator for the maximum price increases. Eskom argues that electricity is relatively price inelastic. From 2007 to 2019, it points out, real electricity prices rose by a cumulative 143%, but sales dropped by only 4.2%. Eskom argues that a number of reasons lie behind the decline, including low economic activity and substitution by, for example, solar power.¹⁶⁰

The South African Cities Network (SACN) however contends that higher prices have led to lower sales. “Between 2009/10 and 2017/18, Eskom electricity prices trebled, resulting in customers reducing their use of electricity through energy efficiency, theft or switching to alternative energy sources (e.g. solar).” This, SACN adds, has hit the electricity sales revenue – residential customers account for a big proportion of the decreases in electricity. Municipalities are the biggest single customer for Eskom’s electricity.¹⁶¹

¹⁵⁸ Ibid, at p 4.

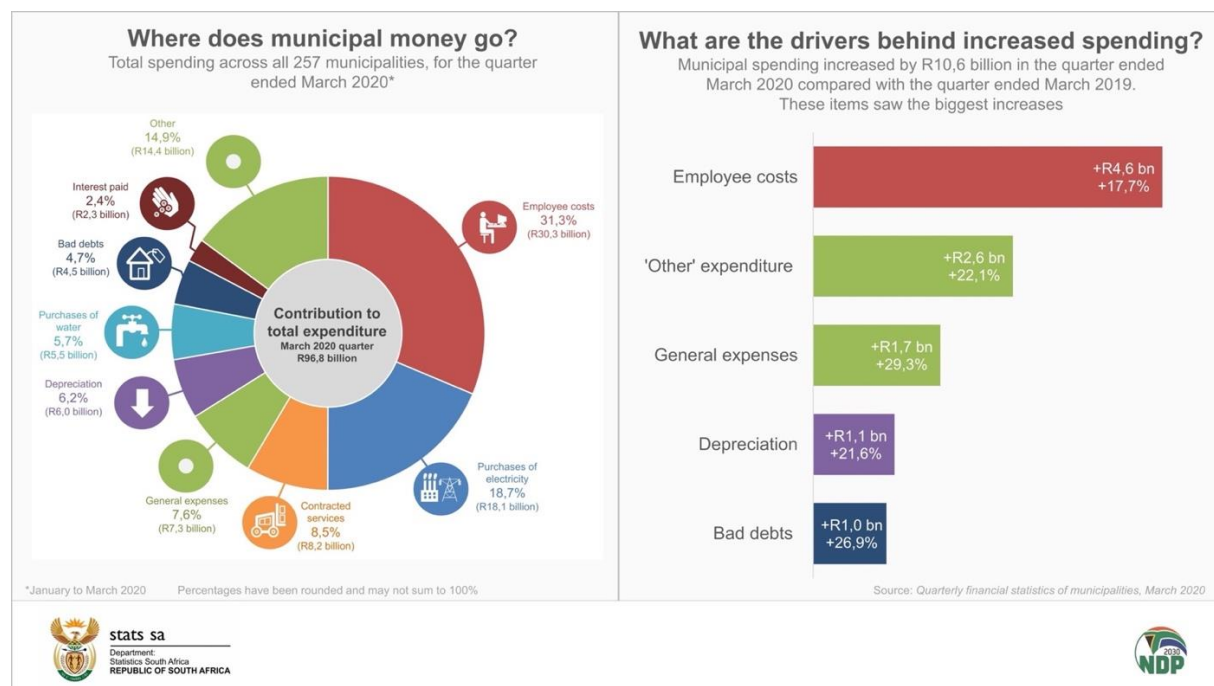
¹⁵⁹ Ibid, at p 21.

¹⁶⁰ Eskom, '2019/2020 Integrated Report' (2020) at p 49 (accessible [here](#)).

¹⁶¹ Eskom, '2019/2020 Integrated Report,' (2020) (accessible [here](#)).

Whatever the reason, falling electricity demand means that electricity prices have to rise to garner the same income or the money has to be made elsewhere. SACN notes that the rapid increase in the wholesale cost of electricity and water, the bulk tariffs, is “squeezing out the surpluses that cities have historically used to cross-subsidise other services ...”¹⁶² It adds that cities, in particular, use electricity sales to cross-subsidise low-income residents.¹⁶³ Some municipalities have introduced fixed charges for supplying electricity, which amounts to a regressive tax.

Employee costs are another big ticket item for municipalities, constituting roughly 25-40% of municipalities’ expenditure. While municipalities have some control over these costs, salary increases for local government employees are determined by the South African Local Government Bargaining Council (SALGBC). Negotiated salary increases have consistently been above inflation in recent years, and are a key cost driver for municipalities.¹⁶⁴



Source: StatsSA, 'An Update to Municipal Spending and Revenue (March 2020)', accessible [here](#).

OPENING UP MUNICIPAL FINANCES

In order to provide greater transparency and clarity on municipal performance, SANEF, in collaboration with OpenUp, has developed a new dashboard which provides municipal data on service delivery, demographic and economic datasets, municipal finance data as well as previous election results. The new dashboard integrates data from National Treasury and OpenUp's existing data platform, [Municipal Money](#).

One can also review municipal audit outcomes in table form in the Local Government Handbook South Africa 2021, published on [municipalities.co.za](#) (accessible [here](#)).

Municipalities provide a minimum amount of electricity, water and sanitation to households that qualify as indigent according to a means test, and which the municipality judges sufficient to cater for the basic needs of a household. Municipalities identified 3,6 million such indigent households in 2018. Of these, 2,8 million received free water, 2,0 million received free

¹⁶² SACN, 'The People's Guide to the State of City Finances 2018' (2018) at p 4 (accessible [here](#)).

¹⁶³ SACN, 14.

¹⁶⁴ Ibid, at p 22-23.

basic electricity, 1,8 million indigent households received free sewerage and sanitation, and 2,3 million indigent households received free refuse removal.¹⁶⁵

Municipalities have discretion to decide to what degree they will subsidise indigent households, which may be up to 100%. In general, each indigent household should receive 6kl of free water a month, 50kWh of free electricity a month, and up to R50 a month or 100% of the cost for basic sewerage and sanitation.¹⁶⁶ The level of household income that determines indigent status also varies from one municipality to another. In 2017 most municipalities (147 out of 257) classified an indigent household as a family earning a combined income of less than R3 200 per month. Eleven municipalities (nine local municipalities and two district municipalities) adopted a lower income poverty threshold of R1 600 per household per month.¹⁶⁷

The way the income threshold for indigent status is applied can differ. The city of Cape Town, for example, has a threshold of R7 000, but a scale of discounts down to completely free services for those households earning R4 500 or less.¹⁶⁸

In a concerning development, it has been reported that cities are increasingly diverting some of the equitable share to expenditures other than free basic services due to financial pressures.¹⁶⁹ Other municipalities, such as Msunduzi Municipality, have reportedly been losing out on their equitable share grants due to their inability to register indigents.¹⁷⁰

5. The current state of municipal finances

It is a widely known fact that many municipalities are struggling to managing their finances effectively, and misappropriation at local government level is pervasive. As a result, in 2014 the Back to Basics approach was adopted “as an urgent action plan to strengthen local government by getting the basics right.” The Back to Basics review found that while a third of municipalities are getting the basics right and functioning well, a third are dysfunctional and a further third are fairly functional with average performance and room for improvement.¹⁷¹ As part of Back to Basics, municipalities have to report monthly on a set of indicators that measure the five ‘basics’: putting people and their concerns first; supporting the delivery of municipal services to the right quality and standard; promoting good governance, transparency and accountability; ensuring sound financial management and accounting; and building institutional resilience and administrative capability.¹⁷²

In some sense, municipalities resemble businesses, and the comparison has been made. “Running a municipality is a fairly simple business, compared to most businesses in the private sector,” remarked Mark Barnes in 2013.¹⁷³ His argument was that they provide services and charge for those services – and do so as a monopoly. The municipal annual report resembles that of a company with an income statement, balance sheet and cashflow statement. Indeed, municipalities can and do go bankrupt, such as the Amathole district municipality.¹⁷⁴ One difference is that residents cannot easily change suppliers as customers do – though migration to better managed municipalities is an option for wealthier residents. Another is that though they may be bankrupt they cannot simply be replaced, as one business can replace another. The biggest and most important difference, however, is that they are part and parcel of the country’s democratic system and their boards, in the form of councillors, are directly responsible to the citizens.

According to the SACN, a municipality’s operating surplus (or deficit) is “a key indicator of financial performance” and “one of the first things that lenders, for example, consider when appraising financial sustainability and creditworthiness.”¹⁷⁵ Between 2015/16 and 2018/19, the average annual increase in operating surpluses of nine of South Africa’s major cities was 4.2%, a positive sign overall.¹⁷⁶ However, the onset of the COVID-19 pandemic has thrown into doubt municipalities’ ability to continue this trend as a result of reduced revenues, higher expenditures, and increased non-payment for services.

¹⁶⁵ StatsSA, 'Non-Financial Census of Municipalities, 2018 Media Release' (2019) (accessible [here](#)).

¹⁶⁶ StatsSA, 'Four Facts about Indigent Households | Statistics South Africa', (2018) (accessible [here](#)) and COGTA 'How Do I Access Free Basic Municipal Services?', (2021) (accessible [here](#)).

¹⁶⁷ StatsSA, 'Four Facts about Indigent Households | Statistics South Africa', (2018) (accessible [here](#)).

¹⁶⁸ City of Cape Town, 'City of Cape Town Indigent Benefits,' (accessible [here](#)).

¹⁶⁹ Siphelele Dlodla, 'Covid-19 takes its toll on SA's largest municipalities', IOL, (2021) (accessible [here](#)).

¹⁷⁰ Estelle Sinkins, 'Msunduzi Municipality to try again to register indigent residents', (2021) (accessible [here](#)).

¹⁷¹ Ministry of Cooperative Governance and Traditional Affairs, 'Back to Basics,' (accessible [here](#)).

¹⁷² *Ibid*.

¹⁷³ Mark Barnes, 'Municipalities Must Be Able to Do Better than This,' BusinessLIVE, (2013) (accessible [here](#)).

¹⁷⁴ Malibongwe Dayimani, 'No Money to Pay Workers: EFF Wants Administrator to Take over Bankrupt Amathole Municipality,' News24, January 12, 2021, accessible [here](#).

¹⁷⁵ South African Cities Network, 'State of City Finances 2020,' (2020) p 25 (accessible [here](#)).

¹⁷⁶ *Ibid*.

Because of the limited resources available, municipalities have eagerly sought out innovative methods of finance, especially for infrastructure projects.¹⁷⁷ An example is municipal pooled financing, a method wherein municipalities cooperate to jointly borrow money, and public-private partnerships.¹⁷⁸

PUBLIC-PRIVATE PARTNERSHIPS (PPPS)

As government infrastructure budgets have come under increased pressure in recent years, PPPs have been viewed as an effective way to deliver much-needed infrastructure. The National Treasury clarifies the difference between a PPP and traditional government infrastructure projects:¹⁷⁹

“A PPP is defined as a contract between a public-sector institution and a private party, where the private party performs a function that is usually provided by the public sector and/or uses state property in terms of the PPP agreement. Most of the project risk (technical, financial and operational) is transferred to the private party. The public sector pays for a full set of services, including new infrastructure, maintenance and facilities management, through monthly or annual payments. In a traditional government project, the public sector pays for the capital and operating costs, and carries the risks of cost overruns and late delivery.”

Since PPPs were introduced in South Africa in 1998, the value of projects completed has risen to over R89,6 billion. In 2019, 2% of the total public-sector infrastructure budget was estimated to go toward PPP projects.¹⁸⁰ A prominent example of a recent PPP in South Africa is the Gautrain Rapid Rail Link project.

In the run-up to the 2021 local government elections, there appears to be a need to rethink how the third layer of government in South Africa is financed. Widespread failures in financial reporting in the 2018-19 year pointed to the stresses on municipalities – before the economic shock of the Covid-19 crisis. In addition, there are continuing pressures on cities from urbanization, all of which points to the potential extreme challenges facing municipal finance, and the essential role to be played by journalists in reporting on municipal finance as a vital element of decentralised democracy enabling citizens to make political decisions.

6. Reporting on municipal finances

At any level of government, budgets provide journalists with a way to prise open local government finance to find compelling and important stories. However, municipal budgets have not come under the same intense scrutiny as national budgets. This is unlikely to be a result of an urban bias, since the level of interest applies as much to metros — which host the HQs of big news media organisations — as to rural municipalities with little and decreasing news coverage. Partly, at least, the lack of detailed budget coverage could be laid at the door of the legendary fear many reporters have of figures. Even financial journalists are primarily interested in national budgets because of their ability to move markets, and the same cannot be said of individual municipal budgets. However, the implications of municipal budgets cannot be over-stated, as they have very real and direct consequences for residents, organisations and businesses in the region.

To report on government budgets requires understanding that they have two key features: (i) targeted amounts for raising revenue, and (ii) the sources of that revenue and details of what the money will be spent on.

The budget is divided into an operational and a capital budget. Operational expenses refer to spending on items consumed during the year, such as staff costs and bulk supplies of water and electricity for sale to residents. Operational revenue refers to, among other things, property rates, transfers from government, the surplus or profit of sales of water, electricity and refuse, and sanitation services to residents.

¹⁷⁷ SALGA, ‘Municipal Innovative Infrastructure Financing Unlocking Infrastructure Financing to Accelerate Service Delivery Conference 2018’ (2018) (accessible [here](#)).

¹⁷⁸ SALGA, ‘Municipal Pooled Financing Mechanisms in South Africa’ (2017) (accessible [here](#)).

¹⁷⁹ National Treasury, ‘Public-private Partnerships’ (2019) p 151 (accessible [here](#)).

¹⁸⁰ *Ibid*.

The municipal budget should be the expression of the will of the residents, and they should be able to check whether the municipality is budgeting for what they want and hold their councillors accountable if not. On the other hand, the budget process set out by treasury is multi-year, complex and tied to a pre-determined planning and consultation process around the Integrated Development Plan (IDP).¹⁸¹ Focusing on the minutiae of the process is tedious and unlikely to yield front-page news, but crucial for journalists to keep track of. Certain parts of the budgeting process — such as consultation meetings with residents — can be more helpful to journalists, for example in hearing what citizens want and whether they are being heard.

The Municipal Budget and IDP Process

Source: National Treasury, 'A Guide to Municipal Finance Management for Councillors', (2006) at pg. 64-67 accessible [here](#).

Step	Process	Date
1 Planning	Schedule key dates, establish consultation forums, review previous processes, and table the proposed schedule in the municipal council. A simplified version of the schedule should also be made public.	The mayor must table the budget process plan for council to adopt by 31 August, 10 months before the next budget year begins.
2 Strategising	Review IDP, set service delivery targets and objectives for next 3 years, consult on tariffs, review indigent policy, credit control, and free basic services. Consider local, provincial and national issues, the previous year's performance, and current economic and demographic trends.	Ideally should occur from August to November
3 Preparing	Prepare budget, revenue and expenditure projections; draft budget policies; consult and consider local, provincial and national priorities. January and February should be used for preliminary consultation and discussion on the budget.	Early December
4 Tabling	Table budget, IDP, and budget-related policies before council; consult and consider formal local, provincial and national inputs or responses.	The mayor must table the budget before council by 31 March.
5 Consultation	The municipal manager must now make the budget documentation public, and submit it to National Treasury and the relevant provincial treasury, and any other government departments where necessary. The local community must be invited to submit representations in response to the budget.	April and May should be used to cater for public and government comment, and to do any necessary revisions.
6 Revision	After considering all comments and submissions, revisions must be made and amendments tabled for the council's consideration.	This step must be completed by 31 May so that the council can start considering it.
7 Approving	Council approves budget and budget-related policies, and any changes to the IDP. The approved annual budget must also be submitted to the National Treasury and Provincial Treasury immediately. If the budget is not approved, it must be reported to the MEC for Local Government and appropriate provincial intervention must be recommended by the Mayor.	The Budget must be approved by 30 June, before the start of the budget year on 1 July.

¹⁸¹ National Treasury, 'A Guide to Municipal Finance Management for Councillors' (2006) (accessible [here](#)).

8 Finalising	<p>Within 14 days after approval of the budget, the draft SDBIP must be submitted. The SDBIP must then be approved within 28 days after budget approval, and published with budget and annual performance agreements and indicators.</p> <p>Throughout the year, there is an ongoing monitoring role played by the mayor and the council and adjustments may be considered by the council if necessary.</p>	<p>Quarterly reports are submitted to the municipal council on implementation of the budget within 30 days after the end of a quarter.</p> <p>The annual report is tabled in the municipal council within 7 months.</p> <p>The mid-year performance assessment is submitted by 31 January.</p>
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To interrogate local government budgets, journalists should seek to find out what is important and interesting to as wide a range of people as possible. In what can be dense and complex material, a journalist's role is to understand the issue and explain it to the audience in a simple yet compelling manner. As with all technical and possibly complex knowledge areas, it is helpful to enlist the aid of experts in interpreting figures and surfacing questions for the municipal management to answer.

BUDGET AND REPORTING PROCESS



Source: Reg Rumney

It has been suggested that one way of looking at a budget is to check to what extent it is aligned with the priorities of the Integrated Development Plan. However, IDP priorities are abstract and South African citizens are rightfully plan-weary. IDPs do not attract much attention, as a Google search will quickly illustrate. Moreover, in practice citizens tend to be interested in issues such as the rates and taxes they pay and the level of service they are receiving.

FINDING THE STORY IN MUNICIPAL BUDGETS

Some aspects to keep in mind when conducting budget analysis:

- **History and context** are important. What are the most important spending priorities for citizens? Does the budget plan to increase spending on those priorities? If so, by how much? If not, why? Where will the money for increased spending come from? For instance, if councillors have identified having a reliable water supply as an important demand from the citizens, how will the municipality deal with this?
- Look for **inconsistencies** between the narrative of the budget document and the figures and within the figures themselves. If the municipality has identified replacement of old and leaking water pipes as the way to fix recurring water losses, money must be earmarked for this replacement. How it will be funded, by the municipality's own revenue or a grant from government?
- The figures are not the story. The **effect of the figures** on the lives and livelihoods of people is. For instance, how will an increase in property rates affect businesses and residents? Is the increase in line with, or below inflation? What is the effect of above-inflation increases of the wage bill on the municipality's need to raise revenue from residents?
- **"Names make news."**¹⁸² This can be extended to those who head municipalities. Hence, the salaries of the municipal executives and councillors, and the increases of those salaries, are of public interest. In some municipalities, the City Manager may have earned up to R3,9 million a year in 2019.¹⁸³ That may sound like a lot but is modest for what is effectively the CEO position of a large business with a turnover of billions of Rands.
- While the municipality's annual report and annual financial statements are backward looking, **the annual budget is forward-looking**, and the assumptions about expected income and spending are what municipal authorities need to explain. National and local governments produce three-year rolling budgets. Generally, the focus is on the coming year only, but the outer years tell a story too. Makana municipality residents may have wondered when the budget was tabled at the end of June 2020 what justified the increase in pay for senior managers of almost 14% in the Budget for 2020/21 - especially after around 16% in 2019/20, 29% in 2018/19 and 22% in 2017/18, particularly when taking into account the municipality's past financial management performance. They may be sceptical of the forecast moderation in the senior managers' salary bill of around 6% each year in the 2021/22 and 2022/23 municipal years.

The Auditor-Generals reports likewise contain a wealth of information for journalists to probe. Year after year the Auditor General has weighed the municipalities and found their governance and accountability wanting. Former AG, the late Kimi Makwetu, expressed his view of municipal finances by titling the 2018/19 report on the audit outcomes for local government "Not much to go around, yet not the right hands at the till".

Like commercial auditors, the AG's office is paid by those it audits to assess the quality and reliability of the financial statements of the entities it audits. Crudely, the purpose of an audit is to examine financial statements to be able to express an opinion about their "fairness or compliance with an identified financial reporting framework and any applicable statutory requirements".¹⁸⁴ The AG's audits go further than this, assessing "the stewardship of public funds, implementation of government policies and compliance with key legislation."¹⁸⁵ The Public Audit Act prescribes the scope of the annual audit of each entity, including giving the usual auditor assurance that the financial statements are free from misstatements but also reporting on the quality of the information in the annual performance report and "material non-compliance with key legislation". The AG also identifies the key internal control failings that need to be fixed to achieve a clean audit.¹⁸⁶

¹⁸² Matthew Winkler and Jennifer Sondag, 'The Bloomberg Way: A Guide for Reporters and Editors', 25th anniversary edition, [13th edition] (Hoboken, New Jersey: John Wiley & Sons, Inc, 2014), 2.

¹⁸³ Loyiso Sidimba, 'Municipal managers to earn more than Ramaphosa', (2018) (accessible [here](#)).

¹⁸⁴ RSA, "Auditing Profession Act No. 26 of 2005 Amended by the Auditing Profession Amendment Act, No. 2 of 2015" (Republic of South Africa, January 12, 2006).

¹⁸⁵ *Ibid.*

¹⁸⁶ AGSA, 'Audit Process | AGSA,' (accessible [here](#)).

One common misunderstanding is that it is the AG's job to detect incidences of corruption. The AG as an auditor does not do the work of a detective or investigative journalist. Importantly, the AG does not set out to detect fraud – though fraud may be detected in the course of the audit. Similarly, they do not evaluate service delivery, only that the annual performance report is “useful and reliable”.¹⁸⁷ However, questions have been raised about whether the AG's office is doing its job properly.

The newly amended Public Audit Act has recently amended the AG's powers to include the following:



Source: Auditor-General, 'Introducing the concept of material irregularities', accessible [here](#).

7. External audit

An external audit must assure management about the accuracy of financial information reported in the financial statements. The most important requirements for effective external auditors are independence and authority. In general, their authority is reinforced by the power they are given to access all information they want and to determine the nature of audit they want to perform (e.g., financial, compliance or value for money audits). The AG acts as the external auditor for all state organs in South Africa. The office is established in terms of section 188 of the constitution.

The AG issues five main types of audit opinion:

1. A clean audit outcome: a financially unqualified audit opinion with no findings on reporting on targets or non-compliance with legal requirements)
2. A financially unqualified audit opinion: the financial statements contain no material misstatements, but the AG has made findings on either reporting on targets or non-compliance with legislation, or both.
3. A qualified audit opinion: the AG finds that the financial statements contain material misstatements of specific amounts, or they have insufficient evidence to decide that specific amounts are not materially misstated.
4. An adverse audit opinion: the financial statements contain significant and numerous material misstatements.
5. A disclaimer of audit opinion: the municipality provided documentation with insufficient information on which to base an audit opinion.

¹⁸⁷ Ibid.

What is a material irregularity?



Source: Auditor-General, 'MFMA Report 2018/19', accessible [here](#).

Lastly, it is important for journalists to understand the difference between irregular, unauthorised and fruitless and wasteful expenditure.

- **Fruitless and wasteful expenditure** is spending done in vain and which could have been avoided. This can be as simple as needlessly incurring interest because of not paying suppliers on time.
- **Unauthorised expenditure** is spending not budgeted for, including overspending of budgets.
- **Irregular expenditure** is spending which does not comply with laws on municipal finances and procurement. Irregular spending can be, but is not necessarily, fraud.

A municipality must recover unauthorised, irregular or fruitless and wasteful expenditure from the person liable for the spending. Unauthorised expenditure can be authorised in an adjustment budget or written off after investigation shows it to irrecoverable.

Municipal councillors must ensure that audit reports, supplied by the municipal audit committee is comprehensively studied and the proposals implemented. The municipal council can then be assured that the municipality is ready for the external auditing process. Take care that the municipality has appropriate performance management systems, processes and frameworks in place and adhered to. Also monitor the development and implementation of mechanisms, systems and processes for auditing the results of performance measurements as part of the administrations internal auditing processes (MFMA Regulation 14(1)(a)). With performance audits, the municipal council must play an enhanced role as a policy-maker and as an oversight body of the municipality.

8. Internal audit

The MFMA requires each municipality and each municipal entity to have an internal audit unit. This must be established as an independent section within the municipal council that takes direction from and provides support to the audit committee and municipal manager/accounting officer. It is generally established with the appointment of professional internal audit staff as employees of municipal council, although small and medium-sized municipal councils may choose to share the function with the district and other municipalities.

The head of the internal audit function is accountable functionally to the audit committee and administratively to the municipal manager and should report regularly on the following:

- An assessment of the adequacy and effectiveness of internal control processes and risk management;
- Significant issues relating to such controls, including potential improvements to established structures;
- The status of the annual audit plan in relation to its milestones.

Internal audit, through its powers to assess internal control systems, needs to do a thorough job that will complement what external auditors do. That is, external auditors must feel confident to rely on the work done by internal auditors in doing an

internal audit and in expressing an opinion on the financial statements and performance of the municipality. For this to happen. The staff of an internal audit unit must be competent and must have done relevant and quality work.

An audit committee is an independent advisory body formed in terms of Section 166 (1) and (2) of MFMA, to advise the municipal council, political office bearers, the accounting officer and the municipal management (or the board of directors, the accounting officer and the management of the municipal entity).

The audit committee reviews and analyses reports received from the municipality's internal audit unit. It is also required to audit the performance measurements of the municipality on a continuous basis and submit quarterly reports on their audits to the municipal manager and the performance audit committee. The audit or performance audit committee must also report their findings at least twice a year to the municipal council.

Finally, the **Municipal Public Accounts Committee (MPAC)** performs an oversight function on behalf of the municipal council. Its role is to assist the municipal council to hold the executive and municipal entities to account, and to ensure the efficient and effective use of municipal resources. By so doing, MPAC helps to increase the municipal council and public awareness of the financial and performance issues of the municipality and its entities. MPAC reports directly to the municipal council through the Speaker of the municipality and interfaces with the other committees of the municipal council through the Speaker, where relevant.

There are various reports that are submitted which provide a detailed insight into the state of municipal finance, including:

- Monthly (MFMA Section 71) budget statements;
- Mayoral quarterly (MFMA Section 52(d)) reports;
- Mid-year (MFMA Section 72) performance assessments and other ad-hoc financial and non-financial reporting; and
- Municipalities are required to submit an annual report for each financial year. This includes its annual performance report, audited annual financial statements and a discussion of results. The municipal council must then produce a responsibility report on the annual report.

9. Suggested resources

- South African Cities Network, 'State of City Finances 2020,' (2020) (accessible [here](#)).
- Municipalities.co.za, 'The Local Government Handbook South Africa 2021,' (accessible [here](#)).
- UN Habitat, 'Guide to Municipal Finance,' (2009) (accessible [here](#)).
- South African Cities Network, 'State of Cities Report,' (2016) (accessible [here](#)).
- IEC, 'Municipal elections handbook,' (2016) (accessible [here](#)).
- StatsSA, 'Quarterly financial statistics of municipalities, March 2020,' (accessible [here](#)).
- National Treasury MFMA (accessible [here](#)).
- Municipal Money (accessible [here](#)).
- Vulekamali (accessible [here](#)).
- Public Affairs Research Institute, 'Local Government', (accessible [here](#)).

