



DRAFT NEDLAC REPORT ON THE MUNICIPAL SYSTEMS AMENDMENT BILL

1. BACKGROUND

- 1.1. The Bill was introduced in the National Assembly on 27 July 2010 where the Portfolio Committee on Cooperative Governance and Traditional Affairs advertised it in the print media calling for written and verbal submissions.
- 1.2. The Chairperson of the Portfolio Committee on Cooperative Governance and Traditional Affairs wrote a letter to the Ministry on 02 September 2010 requesting that the Bill be referred to NEDLAC for its consideration before the public hearings were held.
- 1.3. The Ministry then wrote a letter dated 09 September 2010 to the effect to Nedlac.

2. INTRODUCTION

- 2.1. The Department of Cooperative Governance and Traditional Affairs presented the amendments into the Bill at the Labour Market Chamber meeting held on 14 October 2010 and it was agreed that a task team should be established to deliberate on the process.
- 2.2. The Task Team consisted of the following representatives:

Business: Vikashnee Harbhajan; Peggy Drodskie; Thami Skenjana and Fani Xaba.

Labour: Norma Craven; Prakashnee Govender; Roger Ronnie; Leon Grobler and Willem van Heerden.

Government: Thembinkosi Mkalipi; Jackey Maepa; Mohammed Bhabha; Nakedi Monyela; Brutus Malada; Fanie Louw and Nhlakanipho Nkontwana.

2.3. The task team met on the following dates:

- 29 October 2010;
- 15 November 2010; and
- 22 November 2010.

3. AREAS OF AGREEMENT

3.1. Insertion of Section 54A

To provide for the appointment of municipal managers or acting municipal manager for procedures and competency criteria for such appointments.

3.1.1. Business agreed to the clause and requested Government to insert timeframes where necessary, eg 54A 6 (b) and to fix the use of words such as municipal council and municipality which were used interchangeably on Sections 56(4) and 54.

3.1.2. Labour agreed with an understanding that Government would categorise municipalities:

- Any acting period should be of limited duration and clearly indicated in any contract and/or resolution; and
- Government to consider the issue of differentiation between different categories of municipalities to limited any reliance on exemptions as contemplated in proposed 54A(10).

3.2. Amendment of Section 56

To make provision for the substitution of Sections (1) and (2) of the Act with similar /corresponding requirements for the appointment of municipal managers.

3.2.1. Government to fix the Bill on the terms municipal council and municipality which were used interchangeably.

3.2.2. Labour and Business agreed to the amendment.

3.3. Amendment of Section 66

The substitution for paragraph (a) of subsection (1) the following paragraph:

(a) approve develop a staff establishment for the municipality, and submit the staff establishment to the municipal council for approval.

Social partners agreed in principle with Labour maintaining the proviso that these issues would be best regulated in a “recruitment, selection and appointment collective agreement”

3.4. Amendment of Section 67

Require that all systems and procedures adopted by municipalities in terms of Section 67(1) must be consistent with uniform standards determined by the Minister.

Social partners agreed in principle.

3.5. Amendment of Section 72(1)(c)(ii)

To harmonise the powers assigned to the Minister to those assigned to municipal councils (s67)

Substitution in subsection (1) for subparagraph (ii) of paragraph (c) of the following:

Municipal staff systems and procedures referred to in section 67(1) and the matters that must be dealt with in such systems and procedures.

3.5.1. Social partners agreed to the amendment.

3.6. Amendment of Section 106

Amended by insertion after subsection (4) of the following subsection:

(5) (a) Where an MEC fails to conduct an investigation within 90 days, notwithstanding a request from the Minister in terms of subsection (4) (a), the Minister may in terms of this section conduct such investigation.

(b) The Minister must send a report detailing the outcome of the investigation referred to in paragraph (a) to the President.

Social partners agreed in principle.

3.7. **Amendment of Schedule 1 of the Code of Conduct for Councillors**

Voting at meetings

2A. A councillor may not vote in favour of or agree to a resolution which is before the council or a committee of the council which conflicts with any legislation applicable to local government.

Social partners agreed in principle.

3.8. **Clause 14**

Transitional arrangements

This Act does not affect the employment contract of a municipal manager or a manager directly accountable to the municipal manager entered into before this Act took effect, and such contract continues until it lapses or is terminated.

Social partners agreed in principle.

4. **AREAS OF DISAGREEMENT**

4.1. **Amendment of Section 56A**

To bar municipal managers and managers directly accountable to municipal managers from holding political office in a political party, whether in a permanent, temporary or acting capacity.

4.1.1. The parties agreed to seek a legal opinion on the clause on whether it was constitutional and consistent with the Employment Equity Act (EEA) and the Labour Relations Act (LRA).

Legal Opinion

It was advised that the proposed S56A does not contradict any aspect of the LRA and EEA

Section 6 of the EEA does prohibit any person from unfairly discriminating against an employee on a listed or analogous ground including that person's "political opinion". However, section 6 does not concern the issue of whether or not Parliament can enact legislation restricting the right of a particular group of employees to hold office in political parties. Likewise, there is no conflict between the subject matter of section 56A and section 4 of the LRA which sets out employee's rights of freedom of association. In any event, section 4 only deals with rights to participate in the activities of trade unions and trade union federations. Accordingly, the LRA and the EEA do not have any impact on the validity of section 56A.

On the other hand, there is no doubt that section 56A limits the rights of municipal rights to exercise certain of their political rights that are guaranteed to citizens by section 19 of the Constitution. Section 19(1) provides that –

“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.”

Our view is that section 56A can be justified under section 36 of the Constitution. Although the provision restricts the exercise of a key Constitutional right, it is restricted in its impact on a limited category of citizens (those holding office as municipal managers). As a result, the limitation is proportionate to the purpose for which it is to be enacted.

4.1.2. Government and Business accepted the opinion.

4.1.3. Labour did not agree that the conclusion reached in the legal opinion was technically correct, since its assessment of whether the limitation in the proposed section 56A was reasonable and

justifiable was linked to meeting the objectives of “service delivery”. However, throughout the negotiations Government had maintained that the objective of this section was to deal with the corruption and the irregular use of political office for benefiting from local government procurement processes. Accordingly the legal opinion had not sought to assess whether there was not a less restrictive means of meeting this specific objective (as opposed to that of “service delivery”). Labour noted its support for stringent regulation to address corruption associated with procurement and more generally, but was of the view that this would be better addressed through amendments to the procurement legislation and the Public Finance Management Act (PFMA). However, Labour would pursue their concerns during the Parliamentary process.

4.2. **Amendment of Section 57**

To determine timeframes within which performance agreements of municipal managers and managers directly accountable to municipal managers must be concluded.

4.2.1. Government argued that the implementation of the Municipal Performance Regulations for municipal managers and managers directly accountable to municipal managers have revealed a need to tighten up the timeframes for signing of performance agreements by senior managers. The objective of this proposed amendment is to ensure alignment of the municipal Integrated Development Plan (IDP), annual performance plan and individual performance as well as to improve accountability and service delivery.

4.2.2 Labour opposed (3A) “any regulations or guidelines that relate to the duties, remuneration, benefits and other terms and conditions of employment of municipal managers” and (4C) any regulations or guidelines that relate to standards and procedures for evaluating performance of municipal managers or managers

directly accountable and intervals for evaluation. Labour maintained support for the development of a collective bargaining process to regulate salaries and terms of conditions of Municipal Managers and managers accountable to Municipal Managers.

4.2.3. Labour disagreed with Government's view that the SALGBC has failed to regulate the remuneration and other terms and conditions of Municipal Managers, leading to absurd situations emerging in many localities. Labour maintained that it was SALGA that had steadfastly refused to permit bargaining on substantive matters in respect of Municipal Managers at the SALGBC. As such, they are particularly opposed to proposed amendments to section 57(3); 57(3A) and 57(4C).

4.3. **Insertion of Section 57A**

Employment of dismissed municipal employees by other municipalities.

4.3.1. Government noted that the purpose of the proposed clause 57A is to prevent municipal employees who have generally been found guilty of serious misconduct and consequently dismissed, from being reappointed by any municipality for predetermined periods to allow them time to rehabilitate. The clause seeks to instil transparency and protect the public interest.

4.3.2 Business supported the clause as a tool to fight corruption and fraud and that Government should categorise offences and prescribe a period for each offence.

4.3.3. Labour remains unconvinced by Government's reasons for these amendments. Any effective recruitment process would be able to screen and exclude unsuitable candidates. They would however be willing to reconsider their stance if the amendments were restricted to corruption and fraud.

4.4. Insertion of Section 59A

To make regulations relating to the remuneration, benefits and conditions of employment of municipal managers and managers directly accountable to municipal managers.

4.4.1. Social partners agreed that salaries of senior managers needed to be regulated but disagreed on the mechanism.

4.4.2. Labour argued that the regulation of remuneration and conditions of service of municipal managers and managers directly accountable to municipal managers should be dealt with through collective bargaining.

4.4.3. Government argued that the current disparities in remuneration and conditions of service for municipal managers and managers directly reporting to municipal managers has led to unhealthy competition for competent and skilled professionals with negative impact on the ability of municipalities to deliver services. Parties to the South African Local Government Bargaining Council (including trade unions) have of own volition, took a decision to exclude municipal managers and managers directly accountable to municipal managers from collective agreements. Government argued that an appropriate structure will be set-up through the regulations to advise the Minister on remuneration and conditions of service of senior municipal managers. The Bill is consistent with the public service policy which excludes senior managers from the bargaining council to minimise any conflict of interests arising from them acting as employer. The Bill will create an environment that will support municipalities to build the necessary capacity to perform their functions through increased staff mobility and retention.

4.5. Insertion of Section 71B

To regulate mandating processes for organised local government

- 4.5.1. Labour argued that the clause was interfering with the Collective Bargaining process and is of the view that section 72 in its current form adequately covers what Government is seeking.
- 4.5.2. Government argued that the clause does not interfere with collective bargaining processes but provides enabling powers for the Minister to regulate mandating processes for organised local government. The clause is in line with the principles of cooperative government which requires all spheres of government to inform and consult one another on matters of interest.

4.6. Amendment of section 72(1)(g)

Insertion of the amendment allowing Minister to make regulations and guidelines on medical aid and pension.

Government noted that the rationale behind the clause is to make it compulsory for all municipal employees to invest towards retirement while they are still working to minimise the burden on the social grants, standardise benefit structures and protect employees from funds that are underperforming.

Labour strongly opposed the inclusion of medical aid and pension in section 72(1)(g) on the basis that this undermines collective bargaining processes and rights. Labour further noted that although the existing section 72(1)(g) already entails collective bargaining matters this was a case of erroneous and bad legislative drafting, and therefore should not be used as a basis for further undermining collective bargaining processes.

All social partners noted that the social security and national health insurance debates were in the process of unfolding in relation to the discussions on the pension and medical aid.

5. CONCLUSION

- 5.1. This report therefore concludes the consideration of the Municipal Systems Amendment Bill at NEDLAC. The report is submitted to the Ministers of Labour and the Minister of Cooperative Governance and Traditional Affairs in terms of Section 8 of the Nedlac Act, No. 35 of 1994.
- 5.2. It is acknowledged that the Nedlac parties may continue to advocate their views in the public consultation and other structured processes.