Wes-Kaapse Provinsiale Parlement
Western Cape Provincial Parliament
IPalamente yePhondo leNtshona Koloni

COMMITTEE REPORT

(Negotiating mandate stage) Report of the Standing Committee on Local Government on the Local Government: Municipal Structures Amendment Bill [B 19B–2018] (NCOP), dated 15 September 2020, as follows:

The Standing Committee on Local Government, having considered the subject of the Local Government: Municipal Structures Amendment Bill [B 19B–2018] (NCOP) referred to the Committee in accordance with Standing Rule 217, confers on the Western Cape's delegation in the NCOP the authority to support the Bill. The Committee further proposes the following amendments:

1. **General legal comment**

   The Municipal Structures Amendment Bill [B 19-2018] (the initial Bill) was considered by the Portfolio Committee on Cooperative Governance and Traditional Affairs during 2018. The Committee, after its consideration of the initial Bill, proposed and agreed on certain changes to that Bill in the form of Bill [B19A- 2018] (the "A" Bill). The changes introduced in the "A" Bill have been incorporated into Bill [B 19B-2018] (the "B" Bill).

   In the initial Bill, the long title provided for the introduction of a minimum of 15 councillors for municipal councils. An amendment to the long title of the initial Bill was not proposed or agreed to in the "A" Bill. The "B" Bill however reflects a change in the long title that now refers to a minimum number of 10 councillors in its long title.

   It is submitted that this is problematic because the change in the long title of the "B" Bill is not an accurate reflection of what the Committee agreed on after its consideration of the initial Bill.

   It is proposed that the procedural and substantive implications of the long title of the "B" Bill are considered.

2. **General legal comment**

   Not all the consequential amendments have been effected. For example, section 63(3) of the principal Act refers to Schedule 1 of the Local Government: Municipal Systems Act, 2000. Clause 32 read with clause 33 repeals the Code and incorporates it into the principal Act. The reference in section 63(3) must therefore be deleted.

   It is proposed that the amendment Bill is checked for any consequential amendments that may be required.

3. Definitions

3.1 Clause 1(a)

The Memorandum on the Objects of the Bill states that the purpose of the proposed definition of "declared elected" is to provide clarity. However, to fully clarify, it is proposed that the words "by the Electoral Commission" are included at the end of the proposed definition.

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3.2 Clause 1(e)

The insertion of the draft definition of "whip" necessitates a consequential amendment to the definition of "political officer bearer" in the Local Government: Municipal Systems Act, 2000.

It is proposed that the definition of "political office bearer" in section 1 of the Local Government: Municipal Systems Act, 2000, is amended to include a whip.

3.3 New Definitions

It is proposed that the Bill is amended by the insertion of the following new definitions:

" **'ordinary meeting'** means a meeting of the municipal council convened by the speaker;

'special meeting' means a meeting of the municipal council convened by the speaker in accordance with section 29(1) for the consideration of a particular matter;".

'urgent meeting' means a meeting of the municipal council convened by the speaker in accordance with section 29(1B);".

4. Clause 3:

Clause 3 of the amendment Bill proposes the deletion of the plenary system of governance.

This proposed amendment will restrict the possible governance structure options that a MEC may consider appropriate. It also removes the ability of a municipal council to revert to a plenary system by default if it decides not to exercise its election in terms of section 42(2) or 54(2). This is particularly pertinent in the case of coalition governments that may not agree on a particular system.

Paragraph 3.3 of the Memorandum on the Objects of the Bill offers the following explanation for the deletion of the plenary executive system:

a) A plenary executive system limits the exercise of executive authority to the full municipal council;

b) The municipal council takes all executive decisions regarding the business of the municipality and is also responsible, as a council, for the political guidance and leadership;

c) A municipal council that has a plenary executive system cannot delegate its executive responsibilities to any individual councillor or to any of its committees; and

d) In instances where a municipal council is very large or has many decisions to contemplate, the taking of decisions in plenary would result in a slow decision-making process.

Despite paragraph 3.3 of the Memorandum on the Objects of the Bill, the memorandum does not provide reasons for the proposed amendment. The first 3 points merely lists the characteristics of a plenary system and do not offer motivation for the proposed deletion of the system. It must be born in mind that the system is chosen because of its characteristics. The fourth point is a general statement which seemingly is made without considering the power of an MEC when the MEC establishes a municipality in terms of section 12 of the principal Act and the factors that the MEC takes into consideration at that point, for example, the size of the council. Also, the power of the MEC in terms of section 20(3)(b) where the MEC may decrease the number of councillors if it is necessary to achieve good and timely executive decisions. It is submitted that the policy basis for the deletion of the plenary executive system is lacking. Clarity is required on the rationale for this amendment.

The proposed amendment is not supported. It is proposed that the plenary system of Governance is retained.

5. Clause 4:

See comment under clause 3.

6. Clause 5:

See comment under clause 3.

7. Clause 7(d):

The requirement of the concurrence of the Minister to effect a deviation may lead to unnecessary disputes in the event that agreement is not reached between the Minister and a MEC. It will furthermore result in a delay in the finalisation of the determination of the number of councillors and subsequent inefficiency.

It is proposed that clause 7(d) is reconsidered and deleted. If it is retained, then it is proposed that express provision is made in the amendment Bill on how the consequences of an agreement not being reached between the Minister and a MEC is to be managed.

8. Clauses 9(b) and 10(c):

Given section 26(2) of the principal Act and the new proposed definition of “declared elected”, it is submitted that the amendments proposed in clauses 9(b) and 10(c) are unnecessary.

It is proposed that clauses 9(b) and 10(c) are deleted.

9. Clause 12(a):

The Code of Conduct for Councillors is proposed for incorporation into the principal Act by the amendment proposed in clause 30. Without the concomitant deletion of Schedule 1 in the Local Government: Municipal Systems Act, 2000, the proposed amendment in clause 13(a) may lead to confusion.

10. Comment on section 29(1) of the principal Act:

Clarity is required on whether the majority of councillors referred to in section 29(1) of the principal Act means a majority of the members allocated to a municipality in terms of its establishment notice (section 12) or does it mean the majority of councillors in office at the time of the meeting. Further, section 30(2) also refers to a majority of. Clarity is also required on whether the same meaning ascribed to the expression "majority of councillors" in section 29(1) should be ascribed to section 30(2) and elsewhere in the principal Act

It is proposed that section 29(1) (councilors in office at the time) and 30(2) (as per the establishment notice) of the Principal Act is amended to provide clarity.

11. Clause 13

The new proposed amendment is supported in as far as it attempts to address the situation where a speaker or acting speaker refuses to call the meeting of the council as requested by a majority of the councillors in terms of section 29(1) of the principal Act. The proposed amendment is problematic for the following reasons:

11.1. The provision is confusing. It is understood that when the speaker refuses to call the meeting, the Municipal Manager can act. If the Municipal Manager is absent or refuses to do so, the MEC may then designate a person to act. The action that either the Municipal Manager or the person designated by the MEC can take is to in turn, on a discretionary basis based on good cause, designate a further person to call and chair the meeting. This is one possible interpretation of the clause, but other interpretations are possible for example, that the Municipal Manager himself or herself calls and chairs the meeting and that it is only the person designated by the MEC who may designate a further person, on good cause, to call and chair the meeting. What the intention is, as set out in paragraph 3.10 of the Memorandum on the Objects of the Bill compared with the substantive content of the clause seems to be at odds with one another because paragraph 3.10 simply states that the person designated by the MEC may call and chair the meeting. The clause is therefore confusing and leads to issues of interpretation. This needs to be clarified.

11.2. The clause does not address ordinary meetings. Two types of meetings are contemplated in section 29(1). These are the "ordinary" council meetings of the council and the meetings requested by a majority of the councillors. It is submitted that the clause must also provide for the situation where a speaker or acting speaker refuses, fails or is unavailable to call the "ordinary" meetings contemplated in section 29(1).

11.3. The action in the clause is triggered when the speaker or acting speaker refuses to call the meeting. The MEC can act when the Municipal Manager is absent or refuses to call the meeting. Why the differentiation between the Municipal Manager and the speaker or acting speaker? Why is it also not when the speaker or acting speaker is absent? It is submitted that the action should also be triggered when the speaker or acting speaker is absent or fails to call the meeting.

11.4. It is understood that the clause now introduces a further level of designation. Clarity is required on what the reason for this is. The purpose of the clause is to ensure a quick response when the speaker or acting speaker does not act. This further level of designation may have the opposite effect.

11.5. In terms of the clause, the Municipal Manager or person designated by the MEC, may on good cause shown, designate a person to call and chair the meeting. The clause introduces the further requirement of "good cause". The power to take the action is discretionary. This is

indicated using the word "may". This discretion is guided by the good cause that needs to be established. "Good cause" is a fluid concept and calls for assessment of the factual context. Concern is raised as to what the good cause must convince the Municipal Manager, or the person designated by the MEC of? In other words, at what objective must the good cause be aimed? It is that answer that will be determinative of whether the Municipal Manager or the person designated by the MEC will exercise the power. It is not clear from the clause in its current form what the objective is. It is submitted that if the clause is retained, it must clearly provide what the objective of the good cause must be.

It is proposed that the new proposed section 29(1A) must be clear and unambiguous and must provide for the Municipal Manager to be empowered to call and chair both types of meetings contemplated in section 29(1) of the Act in the event that the Speaker or Acting Speaker refuses, fails or is absent to call meetings contemplated in section 29(1). In the event that the Municipal Manager is absent, refuses or fails to call such meetings, then the MEC for Local Government must designate a person to call and chair the meetings for the purpose of electing an Acting Speaker to preside over the remainder of the meetings.

It is further proposed that the Bill is amended by the insertion after line 57 on page 5 the following clause:

"(1B) The speaker may convene an urgent meeting if a special meeting was not requested in accordance with subsection (1) on a particular matter but the speaker, in his or her determination, is of the opinion that the particular matter requires a meeting of the municipal council.".

12. Clause 14

Section 29A provides for ordinary, special and urgent meetings. What is meant by these different types of meeting are not defined. The lack of clarity leads to problematic interpretation, particularly when applying sections 18(2) and 29(1) of the Principal Act. It is submitted that currently not all the committee meetings of council may be called by the Municipal Manager, for example, a disciplinary committee meeting. Is the intention of this clause to change the current arrangement that exists? If so, how is it intended to work practically?

It is proposed that the terms "ordinary", "special" and "urgent" meeting are clearly defined. It is also proposed that the nature of the meetings referred to in section 18(2) and 29(1) is clarified i.e. would the meetings contemplated in section 18(2) be considered ordinary meetings and those contemplated in section 29(1) when a request for a meeting is made, would those be considered special meetings? Clarity must be provided in this regard.

13. Clause 16:

See comments made under clause 3.

14. Clause 23:

It is not clear from the provisions of the new proposed section 79A when it is envisaged the reports and reviews referred to should be done because no time periods are provided for.

The provision in the new proposed section 79A(5)(b) is already provided for in section 166(1) of the Local Government: Municipal Financial Management Act, 2003. The new proposed provision is superfluous.

It is proposed that clause 23 must be reconsidered and redrafted to provide clarity.

15. Clause 26:

If the references to sections 9(e), (f) and 10(c) are deleted in the sections listed in this clause, then what is envisaged will govern the election of members of an executive committee should a MEC intend to change the type of municipality in terms of section 16(1)(a) of the principal Act from the type referred to in section 9(e), (f) and 10(c)? The amendment Bill does not contain any savings or transitional provisions. Clarity is required in this regard.

See the comment under clause 3 in this regard.

16. Proposed Schedule 7

16.1 Item 5(2)

The words "must be removed from office as a councillor" must be changed to "may be removed from office as a councillor". This will align the provision to the rest of the provisions in item 5 thereby allowing for a uniform procedure to be followed that complies with the rules of natural justice before a councillor can be removed or fined.

16.2 Item 16

The provision provides that in each investigation, an investigator or initiator is appointed regarding the conduct of investigations. This may not always be possible and therefor it is proposed that an alternative is provided for. It is proposed that provision is made in the Code that additionally, a person who can act as an initiator in the investigation must be appointed. It must also be clear that a municipal council must appoint a special committee and express provision must be made as to what must constitute the special committee.

It is proposed that item 16(1) must be amended to read as follows:

"When a municipal council has considered a report as referred to in item 15(1)(c) and decided that disciplinary steps must be instituted against a councillor, the municipal council must –

(a) establish a special committee consisting of councillors, or councillors as well as a person with the appropriate legal knowledge –

(i) to investigate and make a finding on any alleged breach of the Code; and

(ii) to make recommendations to the Council regarding an appropriate sanction or sanctions;

(b) appoint a person to act as an initiator in the investigation or authorise the municipal manager to appoint an initiator.".

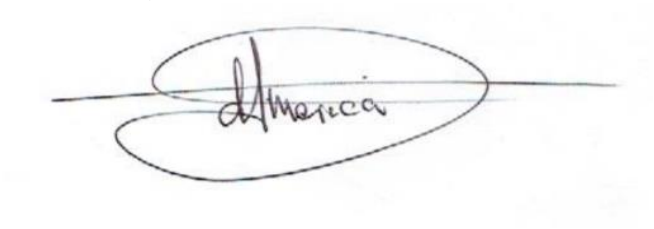
The current item 16(4)(b) must be amended by adding the following words at the end of the provision: "by the MEC." This will ensure that the MEC can be assured that the appeal was received by the municipality when making the finding on the appeal.

16.3 Item 17(7)

It is not clear whether the reference to the "rules of natural justice" means that the listed actions or aspects thereof are subject to the Promotion of Administrative Justice Act, 2000. It is submitted that clarity must be provided in this regard.

It is proposed that Schedule 7 of the Bill is amended by the substitution of item 17(7) with a new paragraph (7).

"(7) Any investigation in terms of this item and any action by the MEC in terms of sub item (6) must be in accordance with section 3 of the Promotion of Administrative Justice Act, 2000 (Act 3 of 2000).".



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CHAIRPERSON: STANDING COMMITTEE ON LOCAL GOVERNMENT
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