GAUTENG
LEGISLATURE
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TO: THE CHAIRPERSON, OCPOL

FROM: NCOP & LEGAL SERVICES UNIT

SUBJECT: LEGAL OPINION: THE CONSTITUTIONAL AND LEGAL IMPLICATIONS OF THE PUBLIC ADMINISTRATION MANAGEMENT AMENDMENT BILL [B10B-2023]

DATE: 25 FEBRUARY 2025

I. INTRODUCTION

The Public Administration Management Bill [B10B-2023] ("Bill") was passed by the National Assembly and referred to the National Council of Provinces for concurrence on Tuesday, 27 February 2024. After having lapsed due to the elections in 2024, the Bill was revived in terms of NCOP Rule 217 and referred to the Select Committee on Cooperative Governance and Public Administration on 29 July 2024 by the NCOP. It was then formally referred to this Committee by the Speaker in terms of Rule 245[1] of the GPL Standing Rules.

[1] This Rule provides:

"**Formal referral of Section 74 or 76 Bill**

(1) When a Bill referred to in Section 74(1), (2) (3)(b) or Section 76 of the Constitution is introduced or tabled in the NCOP and formally referred to the Speaker by the NCOP, the Speaker must refer the Bill and any accompanying papers to:

(a) the relevant Committee or an Ad hoc Committee; and

(b) the relevant Member of the Executive Council with a request that he or she submit the views of the Executive Council on the Bill to the Committee.

(2) The Secretary must deliver a copy of the Bill immediately to every Member."

This legal opinion seeks to advise the Chairperson and Honorouble Members on the constitutional and legislative implications of the Bill.

In order to facilitate that discussion, we have structured this opinion into five parts. Part I contains this introductory section, Part II sets out the background of the Bill as well as the constitutional and legislative framework underpinning it, in order to place it into context. We proceed to embark upon a clause by clause analysis in Part III. In Part IV, we provide some guidance on the public participation strategy on this Bill. Lastly, our conclusions and recommendations will be found in Part V.

II. BACKGROUND

Section 76(3) (d) and (f) of the Constitution requires that a Bill must be dealt with in accordance with section 76(1) and (2) if it falls within a functional area listed in Schedule 4 or provides for legislation envisaged in sections 195(3) and (4) and section 197 of the Constitution. This Bill must be dealt with in accordance with the procedure established by section 76 of the Constitution as it is legislation listed in section 76(3) of the Constitution, namely legislation envisaged in sections 195(3) and 197 of the Constitution.

In terms of its long title, this Bill seeks to—

> "amend the Public Administration Management Act, 2014, so as to further provide for the transfer and secondment of employees; to provide clarification regarding the prohibition against employees conducting business with organs of state; to provide for the National School of Government to be constituted as a national department; to provide for the removal of employment disparities across the public administration; to provide for the co-ordination of the mandating process for collective bargaining in the public administration; to amend the Schedule so as to effect certain consequential amendments; and to provide for matters connected therewith."

This is the constitutional framework through which we analyse this Bill. We now proceed to provide a clause by clause analysis on the Bill.

III. Clause by Clause Analysis

Clause 1 - Definitions section

This clause proposes for the insertion of new definitions in the Principal Act. These include definitions for ‘‘head of institution’’, ‘‘Labour Relations Act’’, ‘‘Municipal Systems Act’’, ‘‘national government component’’ ‘‘organ of state’’ ‘‘organised local government’’, ‘‘provincial department’’, ‘‘provincial government component’’, ‘‘public administration’’, ‘‘public entity’’, and ‘‘public service’’.

These definitions are merely to assist with providing clarity in the Act and we do not have any proposed amendments.

Clause 2 - Amending section 5 of the Principal Act (Transfer of employees)

Section 5 of the Principal Act is currently not operational. However, its provision allow for the transfer of employees “within an institution or to another institution”. The proposed amendment seeks to broaden the transfers of employees to be applicable not only within the public service but between the public service and municipalities and between municipalities.

Furthermore, in terms of clause 2 (2), the transfer of an employee may only occur if four conditions are met: (a) if reasonable grounds exist; (b) if the employee is suitably qualified, as envisaged in section 20(3) to (5) of the Employment Equity Act,[2] for the intended position upon transfer; if the employee requests or consents in writing to the transfer; and lastly it must be with the concurrence of the relevant executive authorities
of the transferring and recipient institutions.

The consequences of the transfer have also been detailed as follows: *(a)* transfer does not interrupt the employee’s continuity of employment; and *(b)* employee may not upon the transfer suffer any reduction in remuneration and conditions of service, unless the employee consents. Furthermore, the remuneration and conditions of service of the employee upon the transfer are as agreed between the executive authorities of the transferring and recipient institutions. Moreover, unless the employee consents, the remuneration and conditions of

[2] 1998 (Act No. 55 of 1998),

service may not be less favourable than those on which the employee was employed immediately before the transfer.''

The rational behind this proposed change is that transfers ensure the mobility of employees across the spheres of Government to where human resource deficiencies exist or where operational requirements necessitate. This will enhance good governance and enable the transferability of skills and resources where required.

We have no proposed amendments to this clause.

Clause 3 - Amending section 6 (Secondments)

This clause seeks to amend section 6 (2)(c) of the principal Act. [3] Currently secondments, in terms of the principal Act, can occur under three circumstances, namely:

> "(a) if the employee possesses the necessary skills and knowledge for the intended position at the time of the secondment; and
> (b) if the employee requests or consents to the secondment; or
> (c) in the absence of consent, after due consideration of any representations by the employee, if the secondment is justified."

This proposed amendment seeks to seeks to insert the word "operationally" under section 6(2) of the principal Act. Thus, an employee may be seconded, inter alia:

> ''*(c)* in the absence of consent, after due consideration of any representations by the employee, if the secondment is operationally justified.''.

[3] Section 6 of the Principal Act reads as follows:

> "6. Secondments.—(1) Any employee of an institution may be seconded to another institution or to any other organ of state in such manner, and on such terms and conditions as may be prescribed.
>
> (2) An employee may be seconded in terms of subsection (1)—
>
> (a) if the employee possesses the necessary skills and knowledge for the intended position at the time of the secondment; and
>
> (b) if the employee requests or consents to the secondment; or
>
> (c) in the absence of consent, after due consideration of any representations by the employee, if the secondment is justified."

This covers instances where, perhaps, the employee does not consent to the secondment, however the operational requirement of the institution require secondment.

Clause 3 seeks to provide that secondments contemplated in section 6 of the principal Act should occur only where it is operationally justified. This ensures that secondments do not result in deficiencies being created which hamper service delivery within institutions.

Clause 4 – Repeal of Section 7

Clause 4 proposes the repeal of section 7 of the principal Act[4] as the transfer of employees affected by the transfer of functions across institutions is adequately regulated in terms of the Constitution of the Republic of South Africa, 1996, the Public Service Act, 1994 and the Local Government: Municipal Systems Act, 2000. Further the reference to section 197 of the Labour Relations Act, 1995, in section 7 is not applicable to transfers or assignments of legislation.

We have no proposed amendments to this clause.

Clause 5 – Conducting Business with an Organ of State

Clause 5 seeks to amend section 8 of the principal Act which regulates conducting business with an organ of state. It prohibits an employee of an organ of state from conduct business with an organ of state; or being a director of a company incorporated in terms of the Companies Act, that conducts business with an organ of state. It further makes contravention of this prohibition criminal offence, which if found guilty, an employee can imprisoned, or mulcted with a fine or both. Furthermore, a contravention of this provision amounts to a serious misconduct which may result in the termination of employment by the employer.

We advise that this proposed provision is a welcomed development and may prove instrumental in responding to the scourge of corruption.

[4] Section 7 of the principal Act provides:

> "7. Transfer of employees upon transfer or assignment of function.—If a function is transferred or assigned from one institution, namely the old institution, to another institution, namely the new institution, as a result of an action envisaged in section 97, 99, 126 or 137 of the Constitution, the provisions of section 197 of the Labour Relations Act, 1995 (Act No. 66 of 1995), apply."

Lastly, the clause seeks to empower the Minister to determine that certain transactions between an organ of state and an employee are not construed as ‘‘conducting business with an organ of state’’ to remove the unintended consequences in the implementation of the Act. Those are, in terms of sub-clause (4), transactions between an employee and an organ of state, which are remunerative but not for profit and which are necessary for the functioning of an organ of state, do not constitute conducting business with an organ of state for the purposes of this section.’’.

Clause 6 – Introducing Section 8A

Clause 6 seeks to insert section 8A into the principal Act. This new section makes provision for conduct of employees or former employees participating in the awarding of work to service providers. A 12 month ‘cooling off’ period for employees involved in the procurement of services of service providers is imposed by the section.

It prohibits employees from accepting employment or appointment to the board of the service provider, the performance of remunerated work or the receipt of any other gratification. Service providers or employees who contravene this provision are guilty of an offence and on conviction liable to a fine of R1 million.

This is somewhat similar to restraint of trade agreement which have been held to be acceptable in law, except in instances where enforcement thereof would be contrary to public policy, especially in cases where there is no legitimate business interest in the restraint.[5]

We further note that this proposed section will also augment section 4 of the Prevention and Combating of Corrupt Activities Act, 2004 which regulates offences in respect of corrupt

[5] *Magna Alloys & Research (SA) (Pty) Ltd. v Ellis* [1984] ZASCA 116; 1984 (4) SA 874 (A). Here, the Appellate Division held that a restraint of trade agreement is valid and enforceable, as long as it is not contrary to public policy, and that a party who alleges that an agreement is contrary to public policy bears the burden of proof. The Appellate Division recognised that, although public policy demands that agreements freely and voluntarily entered into should be honoured, it also precludes the enforcement of a contract that imposes an unreasonable restriction on a person’s freedom of trade.

See also *Masstores (Pty) Limited v Pick n Pay Retailers (Pty) Limited* [2016] ZACC 42; 2017 (1) SA 613 (CC) at para 35:

> “Restraint of trade cases exhibit the same tendency. It is generally accepted that a restraint “will be considered to be unreasonable, and thus contrary to public policy, and therefore unenforceable, if it does not protect some legally recognisable interest of the employer, but merely seeks to exclude or eliminate competition”.”

activities relating to public officers. Furthermore, the newly enacted Public Procurement Act 28 of 2024, has a whole chapter on Procurement Integrity and Debarment (Chapter 3) which will assist in regulating such matter. [6]

Moreover, it is proposed that a national register be created to document/record those found to have contravened this provision. This would be similar to the national sexual offences register.

Clause 7

This clause seeks to amend section 9 of the principal Act by inserting subsection (3). This subsection reads as follows:

> ''(3) For the purposes of this section, **'employee'** includes a person contemplated in section 12A of the Public Service Act and a person performing similar functions in a municipality.''.

We have no proposed amendments to this clause.

Clause 8

Clause 8 seeks to amend section 10(2)(a) of the principal Act to provide that departments must, within their available budget, provide for compulsory training that is directed by the Minister to address developmental needs of categories of employees.

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[6] See for example, section 10 of the Public Procurement Act:

> "Conduct of persons involved in procurement
>
> 10. An accounting officer or other official, or a member of an accounting authority, bid committee or the Tribunal, or any other person, involved in procurement in terms of this Act must—
>
> (a) exercise powers and perform duties impartially and with the degree of care and diligence that a reasonable person would exercise in similar circumstances;
>
> (b) not use their position, or information obtained because of their position, improperly to gain an advantage for themselves or someone else or cause prejudice to any other person;
>
> (c) not interfere with or exert undue influence on any person involved in procurement; and
>
> (d) if a conflict of interest exists in a procurement matter, disclose such conflict and recuse himself or herself from participating in the process of that procurement matter."

See also sections 11, 12, 13 and 14 of the Public Procurement Act.

Clause 9 – National School of Government

Clause 9 seeks to amend section 11 of the principal Act to establish the National School of Government as a national department to provide education and training to employees in all spheres of government, including municipalities and public entities.

Clause 10

Clause 10 seeks to repeal section 12 of the principal Act as it has become redundant following the proposed amendment to section 11 of the principal Act. For ease of reference section 12 provides:

> "12. Directive by Minister relating to education.—
>
> (1) The Minister, in consultation with the Minister responsible for higher education and training, may direct the School to provide qualifications, part-qualifications and non-formal education as recognised by the National Qualifications Framework or the South African Qualifications Authority.
>
> (2) Insofar as a directive under subsection (1) applies to municipalities, the Minister must act in consultation with the Minister responsible for local government and after consultation with organised local government."

Clause 11

Clause 11 seeks to amend section 13 of the principal Act to remove the unnecessary burden placed on the Cabinet in relation to the determination of prerequisite and/or mandatory education and training.

We have no proposed amendments.

Clause 12

Clause 12 provides for the deletion of section 16(2) of the principal Act. Section 16 (2) provides:

> "(2) The Minister must prescribe minimum norms and standards in terms of subsection (1) (a) in consultation with the relevant executive authority."

Therefore, the process to issue norms and standards in respect of the promotion of values and principles contemplated in section 195 of the Constitution will be in terms of the processes contemplated in section 18 of the principal Act.[7]

We have no proposed amendments.

Clause 13

Clause 13 seeks to amend section 17(7) of the principal Act to remove reference to ‘‘and its members’’. Section 17(7) of the principal Act requires the Minister responsible for the Public Service and Administration to prescribe the powers of the Office and its members. The principal Act does not provide for functions of individual members and therefore it is proposed that it is not required or necessary for powers of members to be prescribed.

We have no proposed amendments in this regard.

Clause 14

Clause 14 provides for the insertion of sections 17A and 17B in the principal Act. Section 17A provides for a process to remove unjustifiable disparities in relation to employees who do not fall within the scope of a relevant bargaining council. To this end the Bill provides for the

[7] Section 18 of the Principal Act provides:

18. Regulations.—(1) The Minister may make regulations regarding—

(a) any matter required or permitted by this Act to be prescribed;

(b) a framework for the establishment, promotion and maintenance of service centres to enhance service delivery of services to the public; and

(c) any matter necessary to prescribe for the proper implementation or administration of this Act.

(2) The Minister must make regulations insofar as they apply to municipalities in consultation with the Minister responsible for local government, Minister responsible for Finance and organised local government.

(3)(a) Different regulations may be made to suit the varying requirements of particular categories of institutions or of particular categories of employees.

(b) When making regulations, the Minister must take into account the nature and functions of different institutions or categories of institutions, as envisaged in section 195 (6) of the Constitution and any public comments contemplated in subsection (4).

(4) The Minister must publish a proposed regulation for public comment for a period of not less than 30 days in the Gazette.”

Minister, after consultation with the relevant Minister, and subject to the processing of regulations, to prescribe—

(a) upper limits of remuneration and conditions of service for certain categories of employees who do not fall within the scope of the relevant bargaining council; and
(b) steps to remove unjustifiable disparities among employees in the public administration provided that such steps must not reduce any employee's remuneration.

We have no proposed amendments to this clause.

Clause 15

This clause seeks to amend section 18(2) of the principal Act to align with the Local Government: Municipal System Act, 2000, regarding the issuing of regulations pertaining to local government after consultation with organised local government. Additionally, a further amendment is proposed to allow for the making of any regulation affecting public entities to be made after consultation with the Minister responsible for public entities.

We have no proposed amendments.

Clause 17 - Short title and commencement

This clause contains the short title which is in line with drafting conventions. It provides as follows:

> "Short title and commencement
> This Act is called the Public Administration Management Amendment Act, 2023,and takes effect on a date determined by the President by proclamation in the Gazette."

We have no proposed amendments.

IV. PUBLIC PARTICIAPTION

The nature and scope of the Legislature's duty to facilitate public participation set out under section 118(1)(a) of the Constitution is trite and need not be recanvassed here; save to say that

this section places a positive duty on provincial legislatures to facilitate public involvement in the legislative and other processes of the legislature and its committees.[8]

The Constitution gives the Legislature a wide discretion on the modalities it chooses to facilitate public involvement. The extent of the facilitation of public participation needed depends upon a number of factors. These include the nature and importance of the legislation and the intensity of its impact on the public – which have been held to be especially relevant.

Ultimately, the important question that Committee needs to ask itself is whether it has taken steps to afford the public a reasonable opportunity to participate effectively in processing this Bill.

i. Nature and importance of the Bill

The importance of the Bill is without a doubt undisputed. It seeks to:

> "amend the Public Administration Management Act, 2014, so as to further provide for the transfer and secondment of employees; to provide clarification regarding the prohibition against employees conducting business with organs of state; to provide for the National School of Government to be constituted as a national department; to provide for the removal of employment disparities across the public administration; to provide for the determination of conditions of service with financial implications; to amend the Schedule so as to effect certain consequential amendments; and to provide for matters connected therewith."

[8] Section 118 of the Constitution provides:

> "(1) A provincial legislature must—
>
> (a) *facilitate public involvement in the legislative and other processes of the legislature and its committees; and*
>
> (b) conduct its business in an open manner, and hold its sittings, and those of its committees, in public, but reasonable measures may be taken—
>
> (i) to regulate public access, including access of the media, to the legislature and its committees; and
>
> (ii) to provide for the searching of any person and, where appropriate, the refusal of entry to, or the removal of, any person.
>
> (2) A provincial legislature may not exclude the public, including the media, from a sitting of a committee unless it is reasonable and justifiable to do so in an open and democratic society." (Own Emphasis)

It thus impacts on the public administration in Gauteng. It is therefore imperative that the public is provided with an opportunity to meaningfully participate in the processing this Bill. In doing so, the Committee must take measures to ensure that the public has the ability to take advantage of the opportunities.

We now move on to provide some guidance on the measures that should be taken by the Committee to ensure compliance with the Constitutional standard set out above.

(b) Modalities

As elucidated above, the Constitution as well as the jurisprudence around public participation does not prescribe the modality that Legislatures must employ in facilitating public participation. Parliament and Legislatures are accorded much deference in that regard. However, those modalities are not immune to judicial scrutiny. They must pass the standard of reasonableness.

In this regard we would propose two modalities to solicit inputs from the public: public hearings and a call for written submissions. The Committee miay want o consider a pre-hearing workshop/ round table discussion prior to the hearing in order to ensure that stakeholders are fully aufait with the contents of the Bill.

ii. Notice

According to the Constitutional Court's jurisprudence, reasonable notice must be at least seven (7) working days. It is advised that such notice period is not exclusively applicable to public hearings or call for written submissions but also includes any pre-hearing workshops.

The notice must also be published in different newspapers of different languages as well as other media platforms. This is to ensure that the word reaches as many affected people as possible.

Further, copies of the Bill, in different languages must be made available to the public prior to the hearings and the workshops e.g. on the GPL's website. This would allow the public to acquaint itself with its content before attending the pre-hearing workshop and the public hearings.

(c) Stakeholders

In *Matatiele Municipality v President of the Republic of South Africa* the Constitutional Court held that:

> "The more discrete and identifiable the potentially affected section of the population, and the more intense the possible effect on their interests, the more reasonable it would be to expect the Legislature to be astute to ensure that the potentially affected section of the population is given a reasonable opportunity to have a say."[9]

This was also reaffirmed in *South African Veterinary Association v Speaker of the National Assembly and Others*[10] at para 43. Thus, in processing a Bill it is important to identify potential targeted stakeholders who are going to be affected by the Bill. Having regard to the nature of the Bill, not only should the general public be invited but an invitation must be extended to targeted stakeholders as well. On that score we have provided a number of proposed targeted stakeholders which include:

List of Potential Targeted Stakeholders

- Trade unions
- Public Affairs Research Institute (PARI)
- Public Service Accountability Monitor (PSAM)
- The Ethics Institute (TEI)
- Corruption Watch
- Tertiary institutions

[9] [2006] ZACC 12; 2007 (6) SA 477 (CC); 2007 (1) BCLR 47 (CC) (*Matatiele*) at para 68.

[10] [2018] ZACC 49; 2019 (2) BCLR 273 (CC); 2019 (3) SA 62 (CC).

These are just a few suggested stakeholders who may make valuable inputs on this Bill. This is certainly not a closed list, we are sure that PPP will also assist in identifying further relevant stakeholders.

V. CONCLUSION AND RECOMMENDATIONS

In conclusion, it is recommended that the Committee notes our commentary and advice set out above. Furthermore, we look forward to providing assistance and guidance to the Committee during the solicitation of public inputs phase.