



Centre for
**CONSTITUTIONAL
RIGHTS**

CENTRE FOR CONSTITUTIONAL RIGHTS

Upholding South Africa's Constitutional Accord

Patron: The Hon Mr Justice Ian G Farlam

The Honourable J.C. Moloi-Moropa, MP
Chairperson: Portfolio Committee on Public Service and Administration
Parliament of the Republic of South Africa
Parliament Street
Cape Town
8000

Attention: Ms Zola Vice

Per email: zvice@parliament.gov.za

5 March 2014

Dear Ms Moloi-Moropa

CONCISE SUBMISSION TO THE PORTFOLIO COMMITTEE ON PUBLIC SERVICE AND ADMINISTRATION ON THE PUBLIC ADMINISTRATION MANAGEMENT BILL [B55B-2013]

Introduction

1. The Centre for Constitutional Rights (the CFCR) is a unit of the FW de Klerk Foundation - a non-profit organisation dedicated to upholding the *Constitution of the Republic of South Africa, 1996* (the Constitution). To this end, the Centre seeks to promote the values, rights and principles provided in the Constitution, to monitor developments including policy and draft legislation that might affect the Constitution and the values, rights or principles provided therein, to inform people and organisations of their constitutional rights and to assist them in claiming their rights.

A UNIT OF THE FW DE KLERK FOUNDATION

PO Box 15785, Panorama, 7506, South Africa / Zeezicht Building, Tygerberg Office Park, 163 Uys Krige Drive, Platteklouf, 7500, South Africa
Tel: +27 21 930 3622 Fax: +27 21 930 3898 Email: info@cfcf.org.za Website: www.cfcf.org.za NPO 031-061//PBO 930004278

Adv Johan Kruger (Director)

Panel of Advisors

FW de Klerk (Chairperson), Dave Steward (Executive Director), The Hon Mr Justice Ian Farlam (Patron), Adv Nichola de Havilland, Adv Paul Hoffman SC, Dr Anthea Jeffery, Adv Johan Kruger SC, Dr Penuell Maduna, Johann Marais, Prof Francois Venter, Prof David Welsh, Prof Marinus Wiechers

2. With reference to your call for submissions as published on www.parliament.gov.za, the CFRP welcomes the opportunity to make concise submissions to the Committee regarding the *Public Administration Management Bill* [B55B-2013] (the Bill) and certain aspects of the Bill that we believe require revision or amendment.
3. It is hence not the purpose or intention of this submission to provide a comprehensive legal analysis of the Bill and all matters related thereto, but rather to draw attention to those aspects and clauses which, in context of those constitutional provisions relevant to public administration, may not be consistent with the Constitution.
4. The CFRP welcomes, in principle, legislation which, as required by section 195(3) of the Constitution, gives effect to the values and principles provided for in section 195(1). However, at the outset, it is important to note that considering the purpose and scope of section 195 of the Constitution, the proposed Bill appears to be limiting the application of section 195 due to a restricted and insufficient definition of "*public administration*".

Constitutional Prerequisites

5. Section 1 of the Constitution enshrines, among others, the values of a multi-party system of democratic government to ensure accountability, responsiveness and openness. These values, together with the constitutional values and principles of constitutional supremacy and supremacy of the rule of law, aim to ensure government, laws and conduct that are rational, reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. As such, democratic government in South Africa is founded upon more than just consent by the governed (more commonly referred to as a mandate by the electorate).¹⁾ It is also founded upon the constitutional principle that government, governance and administrative action are subject to and limited by the relevant provisions of the Constitution.
6. Accordingly, section 2 of the Constitution affirms that any law or conduct inconsistent with the Constitution as supreme law is invalid. Moreover, all obligations imposed by the Constitution must be fulfilled.
7. Government in South Africa is, in terms of section 40(1) of the Constitution, constituted as national, provincial and local spheres of government. These spheres of government are distinctive, interdependent and interrelated and bestowed with a combination of exclusive and concurrent powers and functions (for instance, as provided for in sections 43, 44, 55, 84, 85, 92, 104, 114, 125, 127, 133 and 156, as well as in Schedule 4 and Schedule 5 to the Constitution).

¹⁾ Currie I & De Waal J *The Bill of Rights Handbook* 5th Edition (Juta Cape Town 2006).

8. The execution of the aforementioned powers and functions within each of the respective spheres of government is generally understood as *public administration*. In this regard, section 195 of the Constitution governs *public administration* - both as a function and structure - in a manner consistent with the values as provided for in section 1:

" 195 *Basic values and principles governing public administration*

- 1) *Public administration must be governed by the democratic values and principles enshrined in the Constitution, including the following principles:*
 - (a) *A high standard of professional ethics must be promoted and maintained.*
 - (b) *Efficient, economic and effective use of resources must be promoted.*
 - (c) *Public administration must be development-oriented.*
 - (d) *Services must be provided impartially, fairly, equitably and without bias.*
 - (e) *People's needs must be responded to, and the public must be encouraged to participate in policy-making.*
 - (f) *Public administration must be accountable.*
 - (g) *Transparency must be fostered by providing the public with timely, accessible and accurate information.*
 - (h) *Good human-resource management and career-development practices, to maximise human potential, must be cultivated.*
 - (i) *Public administration must be broadly representative of the South African people, with employment and personnel management practices based on ability, objectivity, fairness, and the need to redress the imbalances of the past to achieve broad representation.*
- 2) *The above principles apply to-*
 - (a) *administration in every sphere of government;*
 - (b) *organs of state; and*
 - (c) *public enterprises.*
- 3) *National legislation must ensure the promotion of the values and principles listed in subsection (1).*
- 4) *The appointment in public administration of a number of persons on policy considerations is not precluded, but national legislation must regulate these appointments in the public service.*
- 5) *Legislation regulating public administration may differentiate between different sectors, administrations or institutions.*
- 6) *The nature and functions of different sectors, administrations or institutions of public administration are relevant factors to be taken into account in legislation regulating public administration".*

Key Concerns regarding the Bill

Definition of public administration and application of the Bill

9. Ad Clause 1 Definitions "public administration": "Public administration" is defined as to mean "the public service, municipalities and their employees". In turn, "public service" is defined as to mean "national departments"; "national government components listed in Part A of Schedule 3 to the Public Service Act"; "provincial departments" as defined; and "provincial government components" as defined.

10. The meaning of "public administration" as construed by Chapter 10 of the Constitution evidently extends well beyond the *public service* (which, according to section 197, is but a service within public administration) and local government. Accordingly, section 195(2) of the Constitution determines that the values and principles enshrined in section 195(1) "apply to...administration in every sphere of government; organs of state; and public enterprises".

11. "Administration in every sphere of government", with reference to section 195(2)(a), can be understood as the public service and municipalities and their employees as correctly defined in the Bill. According to Devenish, "public administration is an extrapolation of the executive...[i]t consists of innumerable officials in a labyrinth of departments and statutory bodies at national, provincial and municipal levels of government".²⁾ As such, the Bill is in compliance with section 195(2)(a) of the Constitution.

12. "Organs of state", with reference to section 195(2)(b), is defined in section 239 of the Constitution as:

"(a) any department of state or administration in the national, provincial or local sphere of government; or

(b) any other functionary or institution -

(i) exercising a power or performing a function in terms of the Constitution or a provincial constitution; or

(ii) exercising a public power or performing a public function in terms of any legislation,

but does not include a court or a judicial officer".

Although the Bill's definition of "public administration" could be construed as to incorporate the definition of "organ of state" as defined in section 239(a) above, it is falling short of the definition of 239(b) of the Constitution.

13. Conversely, the Bill's definition of "public administration" also does not provide for the inclusion of "public enterprises", as required by section 195(2) of the Constitution. In this regard, Hoexter contends that "the Constitution makes it clear that the public administration encompasses the 'public service', or

²⁾ Devenish DE *The South African Constitution* (LexisNexis Butterworths Durban 2005) 365.

*the employees of government departments...local government administrations, the security forces and the many parastatal or 'fringe' organisations to be found in the modern state...which include public enterprises, regulatory boards, cultural bodies and other entities wholly or partly controlled by government...Telkom, Eskom and Transnet, the Health Professions Council of South Africa, the South African Broadcasting Corporation and the South African Law Reform Commission".³⁾ In *Hoffmann v South African Airways*⁴⁾ and *Chirwa v Transnet Ltd and Others*⁵⁾ the Constitutional Court agrees with this interpretation.⁶⁾*

14. The definition of "*public administration*" as provided for in the Bill, read with the definition of "*institutions*" in clause 1 and the provisions of clause 2 regarding the application of the Bill, undoubtedly restricts the application of the Bill to the public service, municipalities and their employees. In the absence of any other legislation giving effect to sections 195(1) - (2) of the Constitution, this Bill will be the relevant legislation referred to in section 195(3). This appears to be the case considering the content of paragraphs 3 and 4 of the *Memorandum on the Objects* of the Bill as well as the preamble of the Bill which determines that "*this Act seeks to give effect to section 195(3) of the Constitution which requires national legislation to ensure the promotion of those values and principles in section 195(1)*". If so, the Bill will be inconsistent with provisions of section 195(2) as it will restrict the application of section 195(1) of the Constitution to the public service as defined, municipalities and their employees.
15. It is hence submitted that the definitions of "*public administration*" and "*institution*" as provided for in the Bill - and therefore the application of the Bill - falls short of the provisions of section 195 of the Constitution as it does not require all organs of State (as defined by the Constitution) and public enterprises (which in most instances are also organs of State as held by the Constitutional Court), to comply with the Bill.

Objects of the Act and principles of co-operative government

16. Although the Bill recognises the principle of co-operative government in its preamble and other relevant clauses, it is important, especially in relation to Chapters 6 - 9 of the Bill, that the Bill incorporates the provisions of section 41(1)(f) - (g) of the Constitution. In this regard, it is recommended that the Committee considers inserting a further sub-clause under clause 3 *Objects of the Act* in order to delineate the provisions of these constitutional requirements without ambiguity:

"3. (1) *The objects of this Act are to -*
 (a)...

...

³⁾ Hoexter C *Administrative Law in South Africa* 2nd Edition (Juta Claremont 2012) 6 - 7.

⁴⁾ *Hoffmann v South African Airways* 2001 (1) SA 1 (CC) at [23] where the Court held that "*Transnet is a statutory body, under the control of the State, which has public powers and performs public functions in the public interest. It was common cause that SAA is a business unit of Transnet. As such, it is an organ of State and is bound by the provisions of the Bill of Rights in terms of s 8(1), read with s 239, of the Constitution*".

⁵⁾ *Chirwa v Transnet Ltd and Others* 2008 (4) SA 367 (CC) at [142] and [146] where the Court held that "[t]he mere fact that Transnet is an organ of State which exercises public power..." after which the Court applies the provisions of section 195 in relation to a labour dispute involving Transnet. See also *Rail Commuters Action Group & Others v Transnet Ltd t/a Metrorail & Others* 2005 (2) SA 359 (CC) at [43].

3. (2) Nothing in this Act shall be construed as a competency of any one of the spheres of government to -

(a) assume any power or function except those conferred on them in terms of the Constitution; or

(b) exercise their powers and perform their functions in a manner that encroach on the geographical, functional or institutional integrity of government in another sphere."

Conclusion

17. In terms of section 1 of the Constitution, democratic government in South Africa is understood as government which does not only represent the people, but formulate and continuously responds to the will of the people in a manner that is accountable, responsive and open. In *Rail Commuters Action Group & Others v Transnet Ltd t/a Metrorail & Others*, the Constitutional Court held that accountability, especially in relation to government and organs of State, was "*an important principle that bears on the construction of constitutional and statutory obligations*".⁷⁾
18. As such, the essence of public administration (as a wide variety of organs and functionaries of the elected executive branch of the State accountable to Parliament) lies in providing public services in the interest of the public. Section 195(1) of the Constitution reiterates this in no uncertain terms. Moreover, section 195(2) provides a clear instruction on who must be subject to the provisions of section 195(1).
19. Although the Bill is, in principle, be welcomed as a positive step in creating a more effective, professional and accountable public service, it will not be consistent with the provisions of section 195(2) of the Constitution if it does not apply to public administration in its widest sense. As no power or function can be exercised outside of the provisions of the Constitution, it is submitted that this Bill must, apart from the public service and municipalities as defined in the Bill, apply to *all* organs of State and *all* public enterprises. We cannot see any reason why Parliament would not, in terms of section 195 read with section 55(2) of the Constitution, want to provide for a mechanism ensuring effective oversight over all organs of State.
20. Also, since certain provisions of this Bill have the potential of encroaching on the competencies, powers and functions of the respective spheres of government, it is important to provide for clear provisions which exclude such an incorrect interpretation.
21. The CFR would like to contribute positively to the promotion and protection of our constitutional democracy by ensuring that public administration functions in a manner that is effective, accountable, transparent and responsive so as to promote and protect our constitutional values, rights and principles. In this regard and if required, the CFR will be available to engage in oral submissions to the

⁷⁾ *Rail Commuters Action Group & Others v Transnet Ltd t/a Metrorail & Others* 2005 (2) SA 359 (CC).

Committee in order to elaborate on this submission, whether during public hearings or at any such time as the Committee may see it fit.

22. We trust that our submission will be of assistance in guiding the Committee's deliberations on the Bill.

Yours sincerely



Adv Johan Kruger
Director