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| **FROM:** | **DIRECTORATE: LAW REFORM** | **TO:** | **PORTFOLIO COMMITTEE ON ENVIRONMENTAL AFFAIRS** |
| **DATE:** | **23 MARCH 2018** | **REF:** | **EXTERNAL LEGAL OPINION** |

**LEGAL OPINION ON THE LEGAL NATURE OF THE WASTE MANAGEMENT BUREAU AND ITS RELATIONSHIP WITH THE DEPARTMENT OF ENVIRONMENTAL AFFAIRS**

**1. LEGAL BRIEF**

The Portfolio Committee on Environmental Affairs [hereinafter referred to as the Portfolio Committee] has requested the Department of Environmental Affairs [hereinafter referred to as the Department] to provide a legal opinion on the legal nature of the Waste Management Bureau [hereinafter referred to as Bureau] and its relationship with the Department.

**2. BACKROUND**

2.1 On 13 March 2018, the Department briefed the Portfolio Committee on Environmental Affairs [hereinafter referred to the “Portfolio Committee”] on three matters. Amongst those matters was a briefing on the waste tyre collection and recycling programme by the Department.

2.2 The Portfolio Committee raised a concern regarding the Director-General of the Department acting as a Chief Executive Officer of the Bureau in the absence of a functional Bureau. This means that the Director-General is the accounting officer for the Department as well as the Bureau. The Director-General must perform all the powers and duties of the Bureau and the Department.

2.3 The Portfolio Committee requested the Department to provide a legal opinion on the legal nature of the Bureau and its relationship with the Department.

**3. LEGISLATIVE FRAMEWORK**

**3.1 National Environmental Management: Waste Act, 2008 (Act No. 59 of 2008)**

The National Environmental Management: Waste Act, 2008 (Act No. 59 of 2008) [hereinafter referred to as NEMWA] was amended by the National Environmental Management: Waste Amendment Act, 2014 (Act No. 26 of 2014) [hereinafter referred to as NEMWAA]. The NEMWAA came into effect on 2 June 2014. Part 7A of Chapter 4 of the NEMWA (as amended) provides for the establishment of the Bureau.

***Establishment of Waste Management Bureau***

Section 34A provides for the establishment of an implementation Bureau to be known as the Waste Management Bureau within the Department, as a juristic person.

The Bureau, headed by a Chief Executive Officer, was established without a Board, and the Chief Executive Officer reporting to the Director-General of the Department as accounting officer. This model was based on the South African Social Security Agency (SASSA) established in terms of the Social Security Act, 2004 (Act No. 9 of 2004).

The Bureau has to comply with the provisions of the Public Finance Management Act, 1999 (Act No. 1 of 1999) [hereinafter referred to as the PFMA]. In the event of absence of a functional Bureau or a Chief Executive Officer, the powers and duties of the Bureau revert to the Director-General of the Department, who, in such a case, must exercise those powers and perform those duties until the Bureau is functional or a Chief Executive Officer is appointed.

***Policy and Minister’s supervisory powers***

The Bureau exercises its powers and functions independently from the Department within the parameters of the policy set by the Minister in terms of section 34B, the service level standards and norms set by the Minister in terms of section 34C and any directives issued by the Minister.

***Functions of the Bureau***

The functions of the Bureau, set out in section 34E, are, amongst others, to implement the disbursement of incentives and funds derived from waste management charges for the minimisation, reuse, recycling, recovery, transport, storage, treatment and disposal of waste and the implementation of industry waste management plans; to promote and facilitate the minimisation, re-use, recycling and recovery of waste; to monitor implementation of industry waste management plans and the impact of incentives and disincentives; to progressively build capacity within the Bureau to provide specialist support for the development and implementation of municipal waste management plans and capacity building programmes; and to support and advise on the development of waste management plans, tools, instruments, processes, systems,norms, standards and municipal waste management plans and capacity building programmes.

***Funding and Financial Management***

The Bureau will be funded in the main from monies appropriated by Parliament and income derived from services rendered.

Section 34G requires the Bureau to manage its books of account and all necessary records in accordance with the PFMA. The Director-General of the Department is thus designated as the accounting authority of the Bureau. The Chief Executive Officer must comply with the provisions of the PFMA in so far as the Bureau’s annual budgets, corporate plans, annual reports and any financial statements. These financial matters must be processed through the Director-General of the Department as the designated accounting authority for the Bureau. The Bureau is further empowered, with the approval of the Minister, to acquire, hold or dispose of immovable property in the course of its business, in terms of section 34I.

***Functions of Chief Executive Officer***

In terms of section 34K, the Chief Executive Officer is responsible for the management of the operations of the Bureau; compilation of a business and financial plan and reports in terms of the PFMA; and the appointment of members of staff. However, these powers are exercised subject to the direction and approval of the Director-General as the designated accounting authority of the Bureau.

The Chief Executive Officer must ensure that the Bureau complies with all relevant provisions of applicable public service policy, regulations and legislation. However, the Chief Executive Officer is accountable to the Director-General of the Department and must report to him or her on the activities of the Bureau.

In terms of section 34L, the Chief Executive Officer is further responsible for the appointment of employees at the Bureau. Employees of the Bureau are employed under the same conditions as public servants, in terms of the Public Service Act, 1994, except for those employees with certain specialist experience, where the Minister in concurrence with the Minister of Finance can determine the scale of remuneration of those specialists. In terms of section 34L(5) a person employed by the Bureau may become a member of the Government Employees’ Pension Fund.

**3.2 Public Finance Management Act, 1999 (Act No. 1 of 1999)**

The object of this Act is to secure transparency, accountability, and sound management of the revenue, expenditure, assets and liabilities of the institutions to which this Act applies.

In terms of section 3, this Act is, amongst others, applicable to departments and public entities listed in Schedule 2 or 3.

***“department”****means a national or provincial department or a national or provincial government component, and* ***“public entity”*** *means a national or provincial public entity.*

Chapter 5, Part 1 deals with the appointment of accounting officers. Section 36(1) requires every department to have an accounting officer, and section 36(3) designate the head of a department as the accounting officer.

Chapter 6 is applicable to public entities. Section 49(1) requires every public entity to have an authority which must be accountable for the purposes of this Act. Section 49(2) states that if a public entity has a board or other controlling body, that board or controlling body is the accounting authority for that entity; or if the public entity does not have a controlling body, the chief executive officer or the other person in charge of the public entity is the accounting authority for that public entity unless specific legislation applicable to that public entity designates another person as the accounting authority.

**4. LEGAL ANALYSIS**

4.1 The legal question is what is the legal nature of the Bureau and its relationship with the Department?

4.2 The Bureau was established in terms of the NEMWAA on 2 June 2014, an amendment to the NEMWA. In this regard, section 34A(1) of the NEMWA, as amended, provides for the establishment of the Bureau as an implementing Bureau within the Department. It is important to note that the Bureau was established within the Department, as a juristic person.

4.3 The intention of the legislature at the time was to establish an implementing Bureau without a Board - with a Chief Executive Officer reporting to the Director-General of the Department as the designated accounting officer. This approach was based on the SASSA model[[1]](#footnote-1). It must also be noted that SASSA is listed in Schedule 3 to the PFMA as a national public entity, as well as other departmental entities such as South African National Biodiversity Institute and South African National Parks[[2]](#footnote-2).

4.4 Section 34G(1) of the NEMWA, as amended, designate the Director-General of the Department as the accounting authority of the Bureau, and section 34K(2) of the NEMWA, as amended, provides for the Chief Executive Officer of the Bureau to be accountable to the Director-General of the Department. It is noteworthy that the Chief Executive Officer of the Bureau exercises the powers of the Bureau, subject to the direction and approval of the Director-General as the designated accounting authority of the Bureau.

4.5 In our view, the legislature’s intention was to establish an implementing Bureau in the Department, without a Board of directors. The Bureau must be headed by a Chief Executive Officer accountable and reporting to the Director-General of the Department. The legislature intended for the Director-General of the Department to be the accounting authority in terms of the PFMA.

4.6 Section 34A(2) of the NEMWA, as amended, states that the Bureau must comply with the provisions of the PFMA. It appears that the legislature further intended for the financial management, reporting and audit requirements of the PFMA to be applicable to the Bureau, despite not being a listed public entity under the PFMA.

4.7 In addition, the Bureau was established within the Department. However, the reference to a juristic person in section 34A(1) presents a legal challenge regarding the actual legal nature of the Bureau.

4.8 A consideration of the features of a juristic person presupposes an independent legal personality. Such a level of independence inherently requires a juristic person to have a Board of directors to perform all its functions. The fact that the Bureau is a juristic person that does not act through a Board of directors, but accounts through the Director-General of the Department, clearly requires revision of the empowering statute as such an arrangement may be contrary to the legal requirement that is applicable to a juristic person. Furthermore, all the other similar departmental entities have Boards of directors and are listed as national public entities in Part A of Schedule 3 to the PFMA.

4.9 Notwithstanding the legal challenge regarding the legal nature of the Bureau, the NEMWA, as amended, established the Bureau within the Department, as a juristic person, reporting and accountable to the Director-General of the Department. However, the Bureau does not currently have a Chief Executive Officer and section 34A(3) of the NEMWA, as amended, provides for the powers and duties of the Bureau to be performed by the Director-General of the Department until a Chief Executive Officer is appointed. The Director-General of the Department is performing the powers and duties of the Bureau while the recruitment processes of appointing a Chief Executive Officer are being finalised. The Director-General of the Department has been performing these powers and duties since the establishment of the Bureau, i.e. 2 June 2014.

**5. CONCLUSIONS**

The intention of the Legislature is to create a public entity or juristic person, independent from the Department, with strong oversight over the operations and finances of the entity by both the Minister and the Director-General. However, the words “established, within the department”, the strong role the Director-General plays and the fact that the Public Service Act and regulations apply to the personnel of the Bureau, except for the scale of remuneration of employees with specialist expertise, may provide the opportunity for different interpretations. This is the reason why the provisions pertaining to the Bureau are amended in the current National Environmental Laws Amendment Bill [B 14 ─ 2017] currently before Parliament.

1. See clause 13 of the Memorandum on the Objects of the National Environmental Management: Waste Amendment Bill [B32B─2013]; SASSA is established in terms of the South African Social Security Agency Act, 2004 (Act No. 9 of 2004). [↑](#footnote-ref-1)
2. See Part A of Schedule 3 of the PFMA. [↑](#footnote-ref-2)