



PARLIAMENT
OF THE REPUBLIC OF SOUTH AFRICA

LEGAL SERVICES

PO Box 15 Cape Town 8000 Republic of South Africa
Tel: 27 (21) 403 2911
www.parliament.gov.za

Tel: (021) 403-2626
Direct: (021) 403-2610
Fax (021) 403-3888
E-mail: sisaac@parliament.gov.za

MEMORANDUM
[Confidential]

TO: Adv BT Bongo, MP
Acting Chairperson: Portfolio Committee on Home Affairs

COPY: Ms P Tyawa
Acting Secretary to Parliament

FROM: Adv Z Adhikarie
Chief Legal Adviser, Constitutional and Legal Services Office

DATE: 22 October 2020

REF: 108/2020/SSI

SUBJECT: Opinion on the IEC's Proposed Amendments to the Electoral Act 1998 and the Local Government Municipal Electoral Act, 2000

MESSAGE: Please find attached the above memorandum for your attention.

Adv Z Adhikarie
Chief Legal Adviser



TO: Adv BT Bongo, MP
Chairperson: Portfolio Committee on Home Affairs

COPY: Ms P Tyawa
Acting Secretary to Parliament

FROM: Adv Z Adhikarie
Chief Legal Adviser, Constitutional and Legal Services Office

DATE: 22 October 2020

REF: 108/2020/SSI

**SUBJECT: OPINION ON THE IEC'S PROPOSED AMENDMENTS TO THE
ELECTORAL ACT, 1998 AND THE LOCAL GOVERNMENT MUNICIPAL
ELECTORAL ACT, 2000**

INTRODUCTION

1. Our Office was requested by Adv BT Bongo, MP, Chairperson of the Portfolio Committee on Home Affairs to advise on the amendments proposed by the IEC to the Electoral Act 1998 (Act No. 73 of 1998) ("Electoral Act") and the Local Government Municipal Electoral Act, 2000 (Act No. 27 of 2000) ("Municipal Electoral Act"). The proposed amendments relate to a prohibition on certain strikes and lockouts.

BACKGROUND

2. The Minister of Home Affairs introduced the Electoral Laws Amendment Bill [B22 of 2020] on 23 September 2020. The Bill was published for public comment on 11 October 2020.

3. On 9 October 2020, the IEC briefed the Portfolio Committee on Home Affairs (“the Committee”) and proposed further amendments to the Bill. An Explanatory Memorandum accompanied the proposed amendment. On 16 October 2020, the IEC provided a further submission to the Explanatory Memorandum.
4. The proposed amendments were not submitted as part of the Bill to Cabinet, were not certified by the Office of the State Law Adviser and were not published in the Government Gazette prior to introduction.¹ It is unclear if other relevant stakeholders have made an input on the proposed amendment.
5. The proposed amendments were also not part of the Bill advertised by the Committee for public comment.

Proposed Amendment

6. The IEC proposes the following amendments:

“Section 112 of the Electoral Act is deleted and substituted with the following:

“Prohibition on strikes and lockouts

- (1) A strike by employees of the Electoral Commission or a lockout by the Electoral Commission as defined in s213 of the Labour Relations Act, 66 of 1995, as amended, is prohibited from-
 - (a) Six weeks before an official registration event and up to fourteen days after the final registration date;
 - (b) The proclamation of an election date up to and including the date on which the final results of that election are published.
- (2) Strikes and lockouts on voting day by employees and employers in the public transport or telecommunication sector are prohibited and are not protected in terms of Chapter IV of the Labour Relations Act, 1995”

¹ Rule 276, Rules of the National Assembly (9th edition).

Section 86 of the Municipal Electoral Act is deleted and substituted with the following:

Prohibition on strikes and lock outs

- (1) A strike by employees of the Electoral Commission or a lock out by the Electoral Commission as defined in s213 of the Labour Relations Act, 66 of 1995, as amended, is prohibited from-
 - (a) Six weeks before an official registration event and up to fourteen days after the final registration date;
 - (b) The proclamation of an election date up to and including the date on which the final results of that election are published.
- (2) Strikes and lockouts on voting day by employees and employers in the public transport or telecommunication sector are prohibited and are not protected in terms of Chapter IV of the Labour Relations Act, 1995”

LEGAL QUESTION

7. Do the amendments proposed by the IEC comply with the Constitution and other applicable legislation?

LAW

8. Section 23(2)(c) of the Constitution, 1996 provides that “every worker has the right to strike”. Section 23(5) provides that “every trade union, employers” organisation and employer has the right to engage in collective bargaining. Further, section 23(5) provides that any limitation of a right in section 23 must comply with section 36(1) of the Constitution.
9. The Labour Relations Act, 1996 (Act No. 66 of 1995) (the “LRA”) was enacted by Parliament to, amongst others, give effect to fundamental rights found in section 23 of the Constitution such as the right to strike and to provide a framework for

collective bargaining.² The LRA applies to everyone including the state, except the National Defence Force and the State Security Agency.³

10. Section 65(1) of the LRA provides for a limitation on the right to strike as follows:

- (1) No person may take part in a strike or a lockout or in any conduct in contemplation or furtherance of a strike or a lockout if—
- (a) that person is bound by a collective agreement that prohibits a strike or lockout in respect of the issue in dispute;
 - (b) that person is bound by an agreement that requires the issue in dispute to be referred to arbitration;
 - (c) the issue in dispute is one that a party has the right to refer to arbitration or to the Labour Court in terms of this Act or any other employment law;
 - (d) that person is engaged in—
 - (i) an essential service; or
 - (ii) a maintenance service.

11. Section 213 of the LRA defines “essential service” to mean:

- (a) a service the interruption of which endangers the life, personal safety or health of the whole or any part of the population;
- (b) the Parliamentary service;
- (c) the South African Police Services.

12. The LRA provides for the establishment of an Essential Services Committee⁴ (“ESC”) which has various functions and powers in relation to essential services.⁵

² Section 2, LRA.

³ Section 2 and section 209, LRA.

⁴ Section 70, LRA: “The *Minister*, after consulting *NEDLAC*, must establish an essential services committee under the auspices of the Commission in accordance with the provisions of *this Act*.”

⁵ 70D. Powers and functions of panel.—

- (1) The powers and functions of a panel appointed by the essential services committee are to—
- (a) conduct investigations as to whether or not the whole or a part of any service is an essential service;
 - (b) determine whether or not to designate the whole or a part of that service as an essential service;
 - (c) determine disputes as to whether or not the whole or a part of any service falls within the scope of a designated essential service;
 - (d) determine whether or not the whole or a part of any service is a maintenance service;
 - (e) ratify a collective agreement that provides for the maintenance of minimum services in a service designated as an essential service; and

The ESC is established as an independent arbitrator to make determinations regarding “whether or not the whole or a part of any service is an essential service;”⁶ “disputes regarding whether the whole or part of a services is an essential service”⁷ and “may determine the minimum services that may be maintained in an essential service”⁸. The ESC may direct parties designated as essential services to negotiate a minimum service agreement (“MSA”) or if an agreement is not reached, direct the parties to conciliate the matter to the CCMA. If parties still fail to agree, the ESC may determine the minimum services required to be maintained in an essential service.⁹

13. Section 210 of the LRA, which provides for the “Application of Act when in conflict with other laws”, states as follows:

“If any conflict, relating to the matters dealt with in this Act, arises between this Act and the provisions of any other law save the Constitution or any Act expressly amending this Act, the provisions of this Act will prevail.”

14. Currently, section 112 of the Electoral Act, prohibits certain strikes and lockouts as follows:

“(1) The service provided by the Commission is an essential service for the purpose of the Labour Relations Act, 1995 (Act 66 of 1995).

(2) Strikes and lockouts on voting day by employees and employers in the public transport or telecommunication sector are prohibited and are not protected in terms of Chapter IV of the Labour Relations Act, 1995.”

15. Section 86 of the Municipal Electoral Act prohibits certain strikes and lockouts as follows:

(f) determine, in accordance with the provisions of this Act, the minimum services required to be maintained in the service that is designated as an essential service.

⁶ Section 70D(1)(a)

⁷ Section 70D(1)(c)

⁸ Section 70D(1)(f)

⁹ Section 72(2) of the LRA provides as follows: “If the parties fail to conclude a collective agreement providing for the maintenance of minimum services or if a collective agreement is not ratified, a panel appointed by the essential services committee may determine the minimum services that are required to be maintained in an essential service.”

“(1) The service provided by the Commission from the date the notice calling an election is published to the date the result of the election is declared, is an essential service for the purpose of the Labour Relations Act, 1995 (Act 66 of 1995).

(2) Strikes and lockouts on voting day by employees and employers in the public transport or telecommunication sector are prohibited and are not protected in terms of Chapter IV of the Labour Relations Act, 1995.”

Public Participation

16. Section 59(1)(a) directs that “The National Assembly must facilitate public involvement in the legislative and other processes of the Assembly and its committees.” The Constitutional Court has reaffirmed “the existence of a justiciable duty on the Legislature to involve the public when drafting and enacting legislation”¹⁰ in numerous cases. A failure by the National Assembly and the National Council of Provinces to facilitate reasonable public participation in its legislative processes may render an Act unconstitutional.

17. With regard to legislation that affects an identifiable group, the Constitutional Court noted in *Matatiele Municipality and Others* 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.”¹¹

18. In *SAVA vs Speaker of the National Assembly*, the Constitutional Court held that a failure to facilitate public participation with an affected group regarding a material amendment to the Bill that occurred during a Committee’s deliberation render the amendment unconstitutional. In this matter, the Portfolio Committee on Health

¹⁰ *SAVA vs Speaker of the National Assembly* [2018] ZACC 49. para 19.

Also see *Doctors for Life International v Speaker of the National Assembly* [2006] ZACC 11; 2006 (6) SA 416 (CC).

¹¹ *Matatiele Municipality and Others v President of the RSA and Others* 2007 (1) BCLR 47 (CC).para 68

accepted a material amendment proposed by a stakeholder without consulting the parties affected by the amendment to the Bill.

Parliamentary Procedure to amend other provisions of legislation

19. A committee may propose various amendments to a Bill before it as provided for in the NA Rules. In some instances, it requires the permission of the NA before it proposes certain amendments. In terms of rule 286(4)(b) “The committee may seek the permission of the Assembly to inquire into extending the subject of the Bill.” In terms of rule 286(4)(c), the committee “if the Bill amends provisions of legislation, must, if it intends to propose amendments to other provisions of that legislation, seek the permission of the Assembly to do so”.

ANALYSIS OF LAW

Regulating the Right to Strike

20. Section 112 of the Electoral Act designates the IEC an essential service in terms of the LRA. Section 86 of the Municipal Electoral Act declares the IEC an essential service in terms of the LRA for a specified period, this being from the date the notice calling an election is published to the date the result of the election is declared. The above provisions are not consistent with each other and declare the IEC as an essential service on different terms.

21. The IEC notes the difficulty in applying the definition of “essential services” in section 213 of the LRA to the services it provides. The IEC notes:¹²

“The use of the essential service concept as contemplated by the LRA to achieve this purposes has created problems, both because of the differences in the wording but more importantly, because the prohibition is open to challenge when considered against the definition of an essential service, and further, because of the provision in the LRA for a Minimum Services Agreement, which still permits a strike by some of the Commission employees.”

¹² IEC Memorandum. Para 8.

22. The IEC is of the view that it is unique and different from other essential services and the “consideration which apply to a determination of an essential service in terms of the LRA do not apply, having regard to the nature of services provided by the Commission”.¹³ The IEC proposes that it should no longer be designated as an essential service and rather that Parliament enact specific provisions that prohibit strikes and lockouts for the IEC.

Conflict of Laws

23. Parliament enacted the LRA to create a single integrated framework for regulating labour relations.¹⁴ Accordingly, section 210 of the LRA was enacted to indicate “the LRA as the pre-eminent legislation in labour matters that are dealt with by that Act.”¹⁵ Any legislation seeking to amend any matter falling under the ambit of the LRA must expressly do so.

24. If the Committee were to accept the proposal, this will create a special dispensation for the IEC outside the LRA’s regulation of strikes and lockouts. However, the proposal does not expressly indicate that it seeks to amend provisions of the LRA. It is also not clear which sections of the LRA will be excluded from application to the IEC.

25. If a special dispensation is enacted for the IEC, there may be unforeseen conflicts between the LRA and the Electoral Act and the Municipal Electoral Act. This is currently the case as is evident in the difficulty of using the definition of “essential service” in terms of the LRA and applying it to the IEC in terms of Electoral Act and the Municipal Electoral Act. Parliament must avoid enacting legislation that may give rise to possible conflicts in law.

Analysis of proposed amendment

26. The Constitution guarantees the right to strike. Like with all rights, the right to strike may be limited in terms of section 36 of the Constitution.¹⁶ Section 65 of the LRA

¹³ IEC Memorandum. Para 15.

¹⁴ See the comments about the history of the LRA in *Chirwa v Transnet Limited and Others (CCT 78/06) [2007] ZACC 23, para 48* and *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others [2007] ZACC 22. Para 100.*

¹⁵ See comment by Skweyiya in *Chirwa*. Para 50.

¹⁶ Section 36: Limitation of rights, Constitution, 1996:

limits the right to strike for essential services. However, this limitation is not an absolute prohibition on the right to strike for essential service workers. Where a service is designated an essential service, the parties can enter into MSA. The MSA will determine the “minimum number of employees in a designated essential service who may not strike” to ensure that there are not disruption in the provision an essential service.¹⁷ The LRA establishes the ESC as an independent arbitrator in disputes regarding essential service. Therefore, the LRA seeks to limit the right to strike for essential workers only to the extent that it is necessary. The LRA also provides independent mechanism (such as the ESC) to regulate any dispute regarding essential services and strikes in general.

27. The IEC’s proposal therefore raises concerns. If adopted, the proposed amendment will result in a limitation on the existing rights of workers including the right to strike and does not provide for parties to enter into an MSA. It also prevents parties from having recourse to the mechanisms recreated in the LRA to deal with strikes and lockouts (such as ESC).

Amending the LRA

28. The IEC states that possible solution to the current issue is to amend the LRA by amending the definition of essential services. However, the IEC states that to amend the LRA, it would first be necessary to approach NEDLAC and “this will lead to unnecessary delays and disputes”¹⁸. It must be noted that the proposed amendment has not served before NEDLAC.

29. Section 5(1)(d) of the National Economic, Development and Labour Council, 1994 (Act No. 35 of 1994) provides that NEDLAC must “consider all proposed labour legislation relating to labour market policy before it is introduced in Parliament”. Parliament legislated the NEDLAC process to ensure proper consultation among

(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—

- (a) the nature of the right;
- (b) the importance of the purpose of the limitation;
- (c) the nature and extent of the limitation;
- (d) the relation between the limitation and its purpose; and
- (e) less restrictive means to achieve the purpose.

¹⁷ Section 72(9), LRA.

¹⁸ IEC Memorandum, 14 October 2020. Para 18.

stakeholders before any proposed labour legislation is introduced in Parliament. Parliament cannot endorse any attempt to circumvent stakeholder consultation due to expediency.

30. From the above, it is clear that the IEC's proposal seeks to create a policy shift in the existing labour law framework. This policy has not served before Cabinet, NEDLAC and other stakeholders prior to being introduced to Parliament. While Parliament has the constitutional power to legislate, it is our view that in the present circumstances it may be best for the matter is first considered in other forums before it serves before Parliament. This will ensure wider stakeholder consultation.

The issue of pending judicial review

31. The Committee must also take note that the issues dealt with in the proposed amendment are currently under consideration in pending litigation. The IEC stated:

“NEHAWU has already referred a dispute to the CCMA arising from the failure by NEHAWU and the IEC to conclude a MSA. A panel appointed by the ESC has determined that the draft MSA be adopted as final, although NEHAWU has taken the award on review in the Labour Court. The MSA identifies job categories and employees who will be permitted to strike, notwithstanding the status of the Commission as a provider of essential services.”

32. The issue of the MSA and the Union was determined in terms of the LRA with the ESC ruling permitting a time specific prohibition on the right to strike. However, as stated above, the Union is seeking a review of the ESC's decision. It is our view, this specific matter is a dispute about the interpretation and application of the LRA that may be best settled via the judicial process. While Parliament has a constitutional power to enact legislation, it should not do so where it may circumvent judicial processes and infringe on the rights of a party to have their dispute determined by a court.¹⁹ This is especially in light of the fact that the IEC is the respondent in the matter pending adjudication and has made the proposal under consideration.

¹⁹ Section 34, of the Constitution. Access to courts.—Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.

Public Participation

33.If the Committee is of the view that it should consider the IEC's proposal, it must ensure that all interested parties are afforded a reasonable opportunity to participate in the Committee's processes. As the proposal was not part of the advertised Bill, the Committee is obliged to facilitate additional public participation with parties that are affected or have an interest in the proposed amendment.

Rules of the National Assembly

34.If the Committee is of the view that it should proceed with the IEC's proposal, the Committee is required to seek the permission of the NA before it proceeds with finalising the amendment. The IEC's proposed amendment seeks to amend other sections of legislation currently not under consideration and the proposal also changes the subject matter of the Bill.

CONCLUSION

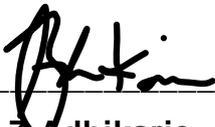
35.The IEC seeks to amend the Electoral Act and Municipal Electoral Act to provide for a specific prohibition to the right to strike. However, Parliament enacted the LRA to give effect to section 23 of the Constitution. The Committee must consider whether it is appropriate to bypass the existing legal framework for strikes and lockouts and to create a special dispensation for an individual entity outside the LRA. Further, if the Committee decides to consider the proposed amendment, careful consideration must be given to the limitation of existing rights in terms of the LRA and to possible conflicts with the proposed amendment and the LRA.

36.Alternatively, the Committee must consider whether it is more appropriate for all stakeholders (Cabinet, NEDLAC and affected parties) first consider the proposed amendment before it serves before Parliament.

37.The Committee must also consider whether it is appropriate for it to consider the IEC's proposal as the same issue is the subject of pending legal challenge and the IEC is one of the parties in the litigation.

38. The IEC is proposing a significant policy shift to existing labour laws. There has not been proper consultation with relevant stakeholders before the proposal was made to the Committee. In light of the above, it is our view that there should first be proper consultation with stakeholders and the policy be properly developed before it serves before Parliament.

39. However, if the Committee is of the view that the amendment should be considered, it must ensure that it consults with all affected parties and interested stakeholders. It must also seek the permission of the NA before it accepts the proposal. Such an amendment must expressly amend the LRA as envisaged in s210 of the Act.



Adv Z Adhikarie

Chief Legal Adviser