

SALGA Submission

Disaster Management Amendment Bill (B2 -2021)

26 August 2021

1. Background

On 30 January 2020, the Director-General of the World Health Organization (WHO) declared the novel coronavirus (COVID-19) outbreak a public health emergency of international concern, which is the WHO's highest level of alarm. Following this announcement, the Minister for Cooperative Government and Traditional Affairs (COGTA) declared a national state of disaster in terms of section 27 of the Disaster Management Act, 2002 (Act No. 57 of 2002). Various arrangements of regulations were also published following the declaration of the national state of disaster, which imposed a national lockdown. The national state of disaster as well as the accompanying regulations had severe consequences and a negative impact on the lives of every citizen in South Africa.

In July 2020, the Hellen Suzman Foundation (HSF) approached the Pretoria High Court seeking an order declaring that the Executive and Parliament have failed in their constitutional obligation to initiate, prepare and pass legislation governing the state's response to COVID-19 and directing them to enact such legislation. On 7 October 2020, the Pretoria High Court handed down a judgment and order dismissing the HSF's application. The HSF then undertook the judgment and order of the Full Court on appeal before the Supreme Court of Appeal.

The HSF then contended that properly interpreted, the DMA is a short-term, stop-gap mechanism empowering the state's response to a national disaster only until such time that more concrete and fit-for-purpose legislation is initiated, prepared and passed.

The Disaster Management Amendment Bill, which is considered a private member's bill, was drawn up by Freedom Front Plus and tabled in parliament.

The Democratic Alliance (DA) also introduced draft legislation to limit the power of the Minister of Cooperative Governance and Traditional Affairs to extend a national state of disaster and to issue lockdown regulations. The bill was published for comment in Government Gazette 43834 in October 2020.

Following invitation to stakeholders and interested individuals by the Portfolio Committee on Cooperative Governance and Traditional Affairs to submit written comments on the Disaster Management Amendment Bill [B2-2021], SALGA Municipal Sustainability Portfolio took the initiative to seek views and contribution

from municipalities on these proposed measures from a local government perspective in order to formalise submission.

2. Rationale for the Bill

The rationale to the Bill is to amend the Disaster Management Act in order to amend the duration of a state of disaster. The Bill further seeks to provide that only the National Assembly, a provincial legislature or a municipal council may resolve to extend a declaration of a national, provincial or local state of disaster respectively and for how long. The Bill also provides for the requisite majorities required in the National Assembly, provincial legislature and municipal council in order to extend a national, provincial or local state of disaster, respectively. The Bill further provides that a resolution to extend a national, provincial or local state of disaster may only be adopted after a public debate. The Bill finally seeks to provide for oversight by the National Assembly over a national state of disaster, and oversight by a provincial legislature over a provincial state of disaster.

3. Problem Statement

“The draft bill therefore seeks to subject the wide-ranging powers of the Minister to declare and extend a national state of disaster, and to make subordinate legislation pursuant to such a declaration, subject to parliamentary supervision.

“The draft Bill also seeks to limit the initial period a national state of disaster can be declared to the same 21-day limit that our law currently places on a state of emergency, the latter resembling the former in key respects.”

According to the bill’s memorandum, the “Disaster Management Act does not currently provide adequate legislative accountability and oversight over the regulations published in terms of it, the duration of a state of disaster, nor in respect of the extension of a state of disaster”. Furthermore, “In a constitutional democracy, any legislation, which has such severe consequences and which impacts all the citizens and their human rights should be subject to more legislative accountability and oversight”.

4. Situation analysis

Clause 1 amends section 27 of the Act by the substitution for subsection (5) of a new subsection (5) as well as the addition of four further subsections. The clause now provides inter alia that a national state of disaster may be effective only prospectively and for no more than 21 days, unless the National Assembly resolves otherwise. It also provides that a Minister may terminate a national state of disaster before it lapses. It further provides that a copy of the notice declaring a national state of disaster must be tabled in the National Assembly. The clause also provides that the National Assembly may disapprove of any

regulations or directions made under such a declaration or may make recommendations to the Minister pertaining to such regulations and directions.

Clause 2 inserts section 27A into the Act. This clause provides for the lapsing of a national state of disaster. The clause further regulates the validity of anything done under or by virtue of any regulation or direction from the time of the declaration of the national state of disaster to the time it lapses.

Clause 3 amends section 41 to provide inter alia that a provincial state of disaster may be effective only prospectively and for no more than 21 days, unless a provincial legislature resolves otherwise. It also provides that a Premier may terminate a national state of disaster before it lapses. It further provides that a copy of the notice declaring a national state of disaster must be tabled in a provincial legislature. The clause also provides that a provincial legislature may disapprove of any regulations or directions made under such a declaration or may make recommendations to the Premier pertaining to such regulations and directions.

Clause 4 inserts section 41A into the Act. This clause provides for the lapsing of a provincial state of disaster. The clause further regulates the validity of anything done under or by virtue of any regulation or direction during the time from the declaration of the provincial state of disaster until the time it lapses.

Clause 5 amends section 55 to provide that a local state of disaster may be effective only prospectively and for no more than 21 days, unless a municipal council resolves to extend it. It also provides that a council may terminate a local state of disaster before it lapses. The clause further sets out how a council may extend a local state of disaster.

Clause 6 inserts clause 55A into the Act, this clause provides for the lapsing of a local state of disaster. The clause further regulates the validity of anything done under or by virtue of any by-law or direction during the time from the declaration of the local state of disaster until the time it lapses.

Clause 7 contains the short title.]

4. Findings from the survey undertaken by SALGA

In light of the invitation extended by the Portfolio Committee on Cooperative Governance and Traditional Affairs to submit written comments on the Disaster Management Amendment Bill [B2-2021], SALGA undertook a survey in municipalities to ascertain a position at local government level on the proposed matters in relation to:

- amend the duration of a state of disaster;

- provide that any action taken as a result of a declaration of a state of disaster is only effective prospectively;
- further provide that only the National Assembly, provincial legislature or council of a municipality may resolve to extend a national, provincial or local state of disaster respectively, and to provide for the duration of the extension;
- further provide for the requisite majorities required in the National Assembly, provincial legislature and council of a municipality in order to extend a national, provincial or local state of disaster respectively;
- provide that a resolution to extend a national, provincial or local state of disaster as the case may be, may only be adopted after a public debate in the respective legislatures;
- provide for oversight by the National Assembly and provincial legislature over a national or provincial state of disaster respectively;
- amend the provisions dealing with the lapsing of a national, provincial or local state of disaster and the termination of the regulations and by-laws made in terms of it as the case may be; and
- provide for matters connected therewith.

5. Submission

5.1 SALGA's Interpretation of the survey from municipalities in relation to Section 55 of the Disaster Management Act (57 of 2002)

CLAUSE 5 – seeks to amend section 55 of the Act by providing *inter alia* that –

- i. *a local state of disaster may be effective only prospectively and for no more than 21 days, unless the Council resolves otherwise.*
- ii. *a Council may terminate a local state of disaster before it lapses.*
- iii. *a Council may extend a local state of disaster.*

According to the data collected from municipalities interviewed during the survey, amendments are not suggested as it modifies the responsibility to extend a local state of disaster and modifies developments of Bylaws and Directions. Municipalities sampled in the survey prefer 3 months' duration from the date of local state of disaster declaration as legislated in the current Act (DMA) instead of the proposed amendment of 21-day duration. This may negatively affect rapid response mechanisms and efficiency modes to act when council is on recess including considering cost implications associated with gazette and publication procedures on extensions for local state of disasters in municipalities.

Based on reflection of the survey from one prominent metropolitan municipality interviewed, raising indefensible costing analysis associated with cumulative gazetting and publications, monthly extensions after 21 days will be exorbitant on municipal fiscal arrangements and towards responding effectively when the mayoral committee/ council is on recess.

CLAUSE 6 – seeks to insert section 55A into the Act by providing *inter alia* for –

- i. *Bylaws or directions to cease to be of force once the local state of disaster lapse.*
- ii. *the validity of anything done under or by virtue of any regulation or direction from the time of the declaration of the local state of disaster to the time it lapses.*

Based on data collected, municipalities are not in support of the proposed amendments in conjunction with Clause 2 and 4 as applicable to the local sphere of government.

5.2 SALGA's Position on the Bill

Having assessed the institutional and governance impacts associated with the proposed bill, SALGA has unreservedly taken a position not to support the Bill [Bill: B2-2021] on the following basis:

- 1) In accordance with survey results as expressed by municipalities and the interpretations analysed;
 - 1.1 a majority of disaster management professionals in municipalities strongly disagree with the view that the Bill should subsequently amend the Disaster Management Act 57, 2002.
 - 1.2 a majority of disaster management professionals in municipalities who actively participate in due processes involved to declare a local state of disaster in consultation with council in their municipalities are satisfied with the current legislative arrangements contained in Section 55 of the DMA on declaration of local state of disaster (of 3 months before termination with monthly extensions) and are able to respond adequately in their municipalities.
 - 1.3 a majority of disaster management professionals in municipalities strongly disagree with the view that there's considerably a need to provide to amend the provisions dealing with the lapsing local state of disaster in relation to termination of the regulations and by-laws made in terms of it.
 - 1.4 a majority of disaster management professionals in municipalities strongly disagree with the observation that there's considerably a need to provide that requisite majorities be required in council of a municipality in order to extend a local state of disaster respectively

- 2) From a local government perspective, a municipal council reserves the right and is adequately authorised in terms of the Municipal Systems Act 32 of 2000 and the Disaster Management Act 57 of 2002 (Section 55 and Sections 27 and 41) respectively to make regulations, bylaws and directions.
- 3) There's also an observation that there is synergy that already exist between the executive powers afforded to the Mayor and Mayoral Committee in terms of the Municipal Structures Act 32 of 2000 and the executive powers implied in the Disaster Management Act 57 of 2002.
- 4) Whereas, the Memorandum is indicating that the Bill has no financial implication for government, there is a case to be made regarding financial implications associated with gazetting. The financial implications of gazetting have been cited as one of the main challenges to the municipal by-law enforcement generally during the law enforcement assessment that was conducted in the 2020-21 financial year.

5.3 Recommendations

- 5.3.1 It is recommended that the Bill [Bill: B2-2021] must not be supported by the Portfolio Committee on Cooperative Governance and Traditional Affairs.
- 5.3.2 That the Portfolio Committee on Cooperative Governance and Traditional Affairs notes the content of the submission made by SALGA.