COMMENT:

PUBLIC ADMINISTRATION MANAGEMENT AMENDMENT BILL, 2021

INTRODUCTION

1. The draft Public Administration Management Amendment Bill ('the Bill') was published in the Government Gazette on 6 April 2021[1] for public comment by interested parties and organisations. A revised version of the Bill was submitted to NEDLAC in August 2021.

2. IMATU and SAMWU submitted comments on the gazetted version of the Bill to the DPSA on 7 May 2021.

3. The DPSA presented a PowerPoint presentation on the gazetted version of the Bill to the SALGBC on 11 August 2021.

4. The Bill was tabled in Parliament's National Assembly on 5 May 2023.

5. The comments outlined herein are based on the revised version of the Bill as presented to the SALGBC and as tabled in Parliament.

6. The Bill, if enacted, will impact on collective bargaining in the municipal sector in a manner which is potentially unconstitutional.

7. On 25 January 2022 the DPSA presented a PowerPoint presentation in response to the SALGBC's comments on the PAMA Bill.

8. The SALGBC members raised various issues and queries at the meeting in response to the DPSA's presentation.

9. The DPSA thereafter agreed for the SALGBC to supplement its comments and engage further regarding the issues that had been raised.

[1] GN 187 of 2021 published in GG 44417 on 6 April 2021

10. Following on from the above, SALGA confirmed that it was not in a position to provide a response to the DPSA's presentation without going through a formal and extended process in order to obtain a mandate regarding their position on the PAMA Bill.

11. IMATU have provided their proposed amendments to the PAMA Bill. IMATU's proposed amendments to the PAMA Bill include the following amendments and insertions:

    11.1 IMATU has also inserted a Section 17A(2)(b) which states that "*steps to remove disparities must not result in any reduction in remuneration or benefits, or in the diminishment of any condition of service of any employee*"

    11.2 As is apparent from the proposed amendments, IMATU is of the view that the proposed Section 17B should be deleted in its entirety which overall is consistent with the SALGBC's comments on the Bill.

12. SAMWU confirmed that they are in agreement with the concerns that were raised by SALGA and IMATU. At the meeting on 25 January 2022 SAMWU advised that the responses provided to the queries that had been tabled by the Unions and SALGA were very 'sketchy' and that the DPSA had effectively failed to respond to their queries and submissions.

13. According to SAMWU, none of the issues raised by them have been addressed by the DPSA and none of their suggestions appear to have found their way into the DPSA's processes.

14. SAMWU confirms that it supports and agrees to the submissions already made IMATU, and have also raised further issues relating to Section 6 (c) and Section 8 of the PAMA Bill. These submissions are set our as follows:

    14.1 Section 6 (c) of the Bill (employees transfers)

        14.1.1 The Bill says that employees will be transferred, even if they do not consent, as long as their managers would be able to show that "the transfer is operationally justified". If this 'operationally justifiable' is not clearly explained, it might invite different or conflicting interpretations, but also it might be susceptible to abuse. Without explanation it will mean that a

municipal employee's place of work will depend on how the elusive term 'operational justification' is interpreted by the municipality and the prospective host institution.

14.2 Section 8 of the Bill

14.2.1 Due to SAMWU's long-standing opposition to the outsourcing which often breeds corruption and remains responsible for the collapse of many municipalities, SAMWU proposes the following additions:

14.2.1.1 With regard to section 8(4), SAMWU proposes that a list of transactions prescribed as remunerative but not for profit must be created. Simultaneously, the regulations that will indicate the process to be followed in identifying the transactions must be included. The point is that, without the list of transactions, this section may be subject to abuse.

14.2.1.2 The prohibition against conducting business with the State must also include the family members of employees in the senior management. This will aid the fight against corruption.

14.2.1.3 Simultaneously, the bill must introduce a cooling-off period before employees in the senior management who were involved directly in contract awards can enter the private sector. In other words, an employee involved in contract awards may not join a 'service provider' (that is a private entity) within 12 months of the award of the contract to the private entity by the State. This is necessary for the purpose of fighting corruption.

15. The SALGBC has previously requested that it be provided with the report that apparently identified and flagged the problems that need to be addressed within the local government sector;

16. It is also concerning that the SALGA representative has confirmed that he is not aware of SALGA's involvement in the compilation of the PAMA Bill despite the DPSA's assertion that it has been consulted in this regard.

17. The Employment Equity Act 55 of 1998, as amended, and the relevant Code of Good Practice deal with the regularisation of income disparities regarding people not being paid for work of equal value. It is apparent from Section 17A (1) of the Bill that the Minister will have the discretion to determine the upper norms and standards in relation to conditions of service and the concern is that this will interfere in the process of collective bargaining within the local government sectoral arrangement and usurp the processes foreshadowed in the Employment Equity Act .

18. The SALGBC is of the view that there is no clear reason why local government needs to be included with the other spheres of government in respect of managing and mandating its collective bargaining process.

19. The employees of the local government perceive the PAMA Bill as a veiled attempt at micromanagement of the local government sector by the DPSA.

20. The PAMA Bill is not clear on what the unjustified disparities are and who will determine these unjustified disparities.

21. The SALGBC does not understand what the PAMA Bill means by its reference to, "steps to remove unjustifiable disparities ," as referred to in Section 17A(b) and requests that the Portfolio Committee provide clarity in respect of that query.

22. The SALGBC is of the view that where the PAMA Bill is unclear on certain issues such as, "what disparities are" and what is meant by "steps to remove unjustifiable disparities"", the ultimate discretion will seemingly then resort to the Minister to deal with this issue. This could result in the Minister and/or the Committee of Ministers encroaching on the powers or functions of lower government institutions.

23. As is apparent from the Meeting on 25 January 2022 and the subsequent comments presented to the DPSA, none of the parties in this sector of local government, including SALGA which represents all municipalities, are in favour of the PAMA Bill.

THE CONSTITUTIONAL AND LEGISLATIVE BACKGROUND

24. Section 23 of the Constitution of South Africa confers on every trade union, employers' organisation and employer the right to engage in collective bargaining. Collective

bargaining is promoted and regulated by the Labour Relations Act 55 of 1995 ('the LRA'). Section 23(5) states that:

(5) Every trade union, employers' organisation and employer has the right to engage in collective bargaining. National legislation may be enacted to regulate collective bargaining. To the extent that the legislation may limit a right in this Chapter, the limitation must comply with section 36 (1)." Local government, which is constitutionally autonomous,[2] is organised and represented by the South African Local Government Association ('SALGA').[3]

25. The South African Local Government Bargaining Council ('SALGBC') is the bargaining council established for the local government undertaking under the LRA. The founding parties to the SALGBC are IMATU,[4] SAMWU[5] and SALGA (here representing the interests of all municipalities as the employer organisation).

26. The parties to the SALGBC bargain collectively and conclude collective agreements concerning matters of mutual interest at national, divisional and local level.[6] From time to time the parties to the SALGBC conclude agreements providing for increases to salaries, wages and benefits.[7]

27. The 2015 SALGBC Main Collective Agreement comprehensively regulates service conditions including hours of work, different types of leave, medical and home-owner benefits, severance pay, organisational rights and grievance procedures.

---

[2] Chapter 7 of the Constitution of South Africa, 1996.

[3] SALGA is an employers' organisation in terms of the LRA. It is also recognised in terms of section 2(1)(a) of the Organised Local Government Act 52 of 1997 as the national organisation representing municipalities (pursuant to section 163 of the Constitution, which mandates legislation to recognise organisations representing municipalities enabling local government to consult with national and provincial government and to participate in the National Council of Provinces and the Financial and Fiscal Commission).

[4] Independent Municipal and Allied Trade Union.

[5] South African Municipal Workers Union.

[6] Clause 10 of the SALGBC Main Collective Agreement, 2015. For instance, the parties bargain over salaries, working hours and medical aid only at national level, whereas determining acting, standby or shift allowances, as well as long service bonuses, is designated for bargaining at divisional level.

[7] The current collective agreement is Circular No.5/2010 and provides for salaries and wages for the period 1 July 2018 until 30 June 2021 (clause 3).

28. In terms of the 1996 Constitution of South Africa, municipalities have autonomous executive and legislative powers.[8] They raise their own revenue and determine their own budgets.

29. The Local Government: Municipal Systems Act 32 of 2000 ('the Systems Act') in sections 66 and 67 provides for municipal councils to determine the remuneration and service conditions of municipal staff,[9] subject to applicable labour legislation. 'Labour legislation' is defined to include collective agreements concluded in terms of the LRA.[10]

30. Moreover, Section 72 (1) (g) empowers the Minister responsible for Local Government to regulate the remuneration and other conditions of service of staff members of municipalities.

31. Section 71(3) of the Systems Act provides for compliance with bargaining council agreements:

    Municipalities must comply with any collective agreements concluded by organised local government within its mandate on behalf of local government in the bargaining council established for municipalities.

32. The Public Administration Management Act 11 of 2014 ("PAMA") governs *(inter alia*) the '*public administration*', which it defines to mean '*the public service, municipalities and their employees*'. Section 16 empowers the Minister to prescribe minimum norms and standards regarding certain issues. Section 17(6) confers on the Office of Standards and Compliance (an organ of the national government) a role in ensuring compliance with these minimum norms and standards.

THE PROVISIONS IN ISSUE

33. The Bill's proposed new sections 17A and 17B greatly extend the scope for interference by national government in the determination <u>through collective bargaining</u> of remuneration and other conditions of service of municipal employees. This impermissibly trenches upon constitutionally enshrined collective bargaining rights, as

[8] Chapter 7 of the Constitution of South Africa, 1996.
[9] Excluding municipal managers and other senior managers, whose employment contracts and other conditions of service are regulated separately under section 57 of the Systems Act.
[10] Section 1 of the Systems Act.

well as on local government autonomy, by fettering the discretion of organised local government to enter into agreements with organised labour.

34. By preventing employers from entering into collective agreements that relate to conditions of service with financial implications, or determining them for their employees, without a mandate from the Committee of Ministers, the legislature is not only limiting the efficacy of collective bargaining but is also impermissibly constraining the autonomy and powers of local government.

35. The latest version of the proposed new Sections 17A and 17B reads as follows (as introduced in the National Assembly and published in Government Gazette No. 48449 of 21 April 2023 and the changes proposed in the amended version of the Bill appear underlined):

Removal of disparities in public administration

17A. In order to remove unjustifiable disparities in relation to remuneration and conditions of <u>service</u> in the public administration, the Minister may, subject to applicable labour legislation <u>any collective agreement and legislation</u> governing the employment of employees in the public administration and after consultation with the relevant Minister responsible, prescribe:

(a) Norms and standards to establish the upper limits of remuneration and conditions of service for employees who do not fall within the scope of the relevant bargaining council<u>; and</u>

(b) Steps to remove unjustifiable disparities among employees in the public administration <u>provided that these steps may not reduce the salary of an employee except in terms of an Act of Parliament or a collective agreement.</u>

Mandate for the determination of conditions of service with financial implications

17B. (1) Subject to the Labour Relations Act, the laws governing the employment of employees and any collective agreement, no employer in public administration may enter into a collective agreement in respect of conditions of service with financial implications or determine them for their employees without a mandate from the Committee of Ministers.

(2) The Committee of Ministers must, in determining the mandate contemplated in subsection (1), take into account affordability and any other factor prescribed by the Minister in consultation with the Minister of Finance.

(~~3~~) For the purposes of subsection (1)—

(a) 'conditions of service' includes annual salary adjustments, salary scales or levels, performance bonuses, pay incentives, pension benefits and any other such benefits.

(b) the Committee of Ministers must consist of the Minister, the Ministers responsible for finance, local government, education, public enterprises, defence, police, correctional services and such other Ministers as the Cabinet may designate ~~and~~ must function the same as a committee of the Cabinet.

(4) The Committee of Ministers must establish an inter-governmental forum in terms of section 9(1) of the Intergovernmental Relations Framework Act, 2005 (Act No. 13 of 2005) including Premiers, Deputy Ministers, organised local government and any other member that the committee may determine to consult for purposes of subsection (1)."

LIMITATION OF CONSTITUTIONAL RIGHTS (COLLECTIVE BARGAINING AND LOCAL GOVERNMENT AUTONOMY)

Section 17A

36. According to the DPSA's response to the SALGBC's initial queries to the PAMA Bill, the DPSA recognises that there will be disparities in relation to remuneration and conditions of service that exist between the different institutions whether at a national and provincial level or a local government level or at public entities, however, these disparities must not be unjustifiable.

37. The DPSA considered the SALGBC's concerns in relation to the section and have amended the draft section accordingly.

Section 17B (1)

38. Section 17B (1) prohibits local government from entering into a collective agreement governing terms and conditions of employment without a mandate from a Committee of Ministers.

39. The DPSA has advised the SALGBC that this section seeks to provide for a better coordination of the State in respect of the collective bargaining arrangements to create parity and alignment amongst institutions in relation to remuneration and conditions of service.

40. They have stated that the mandating arrangements are not conceived to erode collective bargaining but rather to ensure that collective agreements are capable of proper implementation.

41. The DPSA claims in its presentation to the SALGBC that the collective bargaining process will not change. The DPSA also, in its briefing presentation to the portfolio committee on 7 June 2023, claimed that the provisions of Section 17B "*do not seek to interfere with any existing collective bargaining constructs*[11]".

42. However, the outcome of the collective bargaining process is indeed impacted where agreements not sanctioned by the Committee of Ministers are rendered unlawful. Unions and employers do not engage in collective bargaining solely for the right to deliberate the outcomes in meetings, but rather for the capacity to achieve - through the force of mass action where necessary (including strikes and lockouts) - results affecting the redistributive deal done.

43. Despite this assertion, the DPSA has further stated that the mandating process is an internal process of the State as employer and if organised Labour rejects the employer's mandated offer, the employer may have to revert back to get a fresh mandate. It is clear that the collective bargaining process will change.

44. The constituent parties to the SALGBC also requested the DPSA to incorporate their statement that the provisions of Section 17B "*do not seek to interfere with any existing collective bargaining constructs"* into the Bill in order that it may have legal effect. The DPSA has declined this request. Respectfully, such a statement will have no legal effect unless it has been incorporated into the Bill.

45. A dispute concerning remuneration and conditions of service of public sector employees (whether in the public service or in local government) is a dispute of interest, which falls to be resolved through collective bargaining - and not by way of determinations issued by a Committee of Ministers.

---

[11] See Meeting Report: Public Service A/B & Public Administration Management A/B: DPSA briefing; Committee Oversight visit Reports; with Deputy Minister - https://pmg.org.za/committee-meeting/37183/

46. This is an obvious limitation of the constitutionally enshrined right of *(inter alia)* municipal employees and their employers jointly to negotiate and determine terms and conditions of employment through a process of sectoral collective bargaining.[12] It also limits the constitutional right of employees to strike in support of a demand in respect of a term of employment not sanctioned by the Committee of Ministers.

47. This provision has the startling effect that a collective agreement in respect of conditions of service with financial implications, freely concluded by employers in the local government sector, as envisaged by the LRA, will be unlawful absent a mandate from the Committee of Ministers. This gives national government *carte blanche* to determine what agreements may be reached by municipal employers and unions. This clearly introduces limitations on:

    47.1 the parties' capacity collectively to bargain; and

    47.2 the constitutional autonomy of local government to self-govern (including by concluding collective agreements enabling it to recruit and retain suitable personnel).

48. The DPSA has also asserted during its presentation to the SALGBC that, notwithstanding the provisions of Section 17, conditions of service will not be reduced – however, there is no such provision in the Bill and no basis upon which to conclude that this is the intention of the law-maker. The introduction of less favourable conditions has the potential to introduce serious dis-order at the level of local government which is inconsistent with the public interest.

49. The SALGBC constituent parties have requested the DPSA to incorporate their statement that "*notwithstanding the provisions of Section 17, conditions of service will not be reduced*" into the Bill in order that it may have legal effect. The DPSA has declined this request. Respectfully, the inclusion of such a statement for certainty and legal effect is important and informs the reason why it ought to be incorporated into the Bill.

---

[12] See e.g. *Health Services and Support-Facilities Subsector Bargaining Association v British Columbia* 2017 SCC 27, a decision of the Canadian Supreme Court which struck down as unconstitutional provisions of legislation which impeded the employees' right to bargain collectively.

50. The SALGBC parties find it disconcerting that the DPSA is not prepared to incorporate their verbal guarantees into the Bill. Such verbal guarantees will have no legal effect unless they are specifically provided for in the Bill. The SALGBC parties are concerned that these verbal guarantees may have been given solely for the purposes of placating the SALGBC parties and obtaining their buy in.

51. International Labour Law recognises the right to bargain collectively with minimal interference from public authority and labour rights have been entrenched in the Constitution and legislation such as the LRA, promulgated, in terms of the Constitution, to give effect to these rights.

52. South Africa is a member state of the International Labour Organisation (ILO). The core ILO conventions have been ratified which has created international law obligations for South Africa which needed to find expression in local legislation.

53. Article 4 of the Right to Organise and Collective Bargaining Convention (No. 98)[13] ("Convention 98"), states that measures appropriate to national conditions shall be taken, where necessary, to encourage and promote the full development and utilisation of machinery for voluntary negotiation between employers or employers' organisations and workers' organisations, with a view to the regulation of terms and conditions of employment by means of collective agreements.

54. According to the ILO's Labour Legislation Guidelines, some jurisdictions require the parties to submit the collective agreement to the public authorities for approval before it becomes valid. Provisions of this kind are compatible with Convention No. 98, provided that they merely stipulate that approval may be refused if the collective agreement has a procedural flaw or does not conform to the minimum standards laid down in the applicable legislation.

55. However, the possibility of interference in the right of the parties to engage freely in collective bargaining arises if the authorities are allowed *carte blanche* to reject an agreement. This constitutes a violation of the principle of voluntary negotiations and the autonomy of the parties.

[13] Convention 98 of 1949

56. Section 17B accords the Committee of Ministers full discretion to reject a collective agreement in the event that it was entered into without a mandate from the Committee of ministers, which falls foul of Convention 98 in that it constitutes a violation of the principle of voluntary negotiations and the autonomy of the parties.

57. The right to engage in Collective Bargaining is not only protected and enshrined in the Constitution. The LRA records that the aim of the Act is to *inter alia* promote and facilitate collective bargaining. Section 1 of the LRA notes that one of its primary purposes is to "provide a framework within which employees and their trade unions and employers and employers organisations can collectively bargain to determine wages, terms and conditions of employment and other matters of mutual interest.

58. In addition, the Constitutional Court has held that legislature's constitutional obligation to promote, protect and fulfil the rights entrenched in the Bill of Rights means that the legislature must provide guidance, where a wide discretion is conferred upon a functionary. The absence of such guidance could render the procedure unfair and violate Section 33 (1) of the Constitution.[14]

59. Legislation is required to be constitutionally compliant and the legislature must take care to limit the risk of an unconstitutional exercise of discretionary powers when it drafts legislation.[15]

60. Having regard to the constitutional autonomy of local government, the Constitutional Court observed in the matter of ***City of Johannesburg v Gauteng v Development Tribunal[16],*** that national and provincial spheres cannot use their regulating powers in order to give themselves, by way of legislation, the power to exercise executive municipal functions or the right to administer municipal affairs.

61. The regulating powers of national and provincial government should be used to ensure that municipalities effectively perform their services and functions. Regulation in the

[14] Janse Van Rensburg No And Another v Minister Of Trade And Industry And Another NNO 2001 (1) SA 29 (CC)
[15] *Dawood v Minister of Home Affairs 2000 (3) SA 936 (CC)*
[16] 2010 (6) SA 182 (CC)

context of the Constitution implies a general managing and controlling role rather than a direct authorising function.

62. The preamble of PAMA states that Section 154(1) of the Constitution stipulates that the national government and provincial governments, must by legislative and other measures, support and strengthen the capacity of municipalities to manage their own affairs, to exercise their powers and to perform their functions.

63. The proposed insertion of Section 17B is in conflict of the preamble of the Act as it seeks to give the Committee of Ministers the power to exercise a municipal function i.e. the right to enter into a collective agreement and permits higher government to encroach on the powers or functions of lower government institutions which is unconstitutional.

64. In response to the SALGBC comments, the DPSA indicated that Collective Bargaining will not be compromised by the enactment of Section 17B and that if Unions reject the mandated offer, the employer will have to revert back to the Minister to get a fresh mandate. The DPSA suggested that Section 17B is merely adding a layer to the Collective Bargaining process.

65. The DPSA has also advised that there is no infringement on the constitutional authority of Municipalities and that it is constitutionally possible and reconcilable for National Government to determine minimum wages or set maxims.

66. Whilst the SALGBC acknowledges these assertions, there is difficulty reconciling the assertions in the DPSA's response and the wording of Section17A and 17B of the PAMA Bill.

67. More specifically SALGA, being the Employer's representative, advised that Organised Local Government has to consult 257 Constitutional Entities when they receive a demand from Unions. These entities give them varying mandates in respect of demands tabled. The Constitutional Entities have their own executive authorities that mandate SALGA. The mandate is thereafter taken to the constitutional 'entities' of SALGA which is what is taken to the SALGBC.

68. In this regard, it bears mentioning that the role of SALGA and its established mandating process in terms of Section 71 of the Systems Act, appears to not have been recognised by the DPSA and the PAMA Bill reflects this.

69. It would appear that this mandating process would be rendered nugatory and superfluous by the proposed Section 17B, invariably resulting in the process of organised collective bargaining being undermined.

70. SALGA, being the constitutional body that is empowered to act on behalf of municipalities, is obliged to follow the mandating process in terms of Section 71 of the Systems Act.

71. Despite this, Section 17B of the PAMA Bill gives the Committee of Ministers, which is not a constitutional body, the direct authority to override the decisions of SALGA in relation to its ability to enter into collective agreements. In this regard, it appears that the Minister for Cooperative Governance and Traditional Affairs will be responsible for the direct mandating function as opposed to this being discharged by the statutorily recognised Employer Organisation which in this instance is SALGA.

72. The SALGBC submits that Section 71 of the Systems Act in the terms of its current construct, is sufficient to deal with any concerns that the DPSA may have, as SALGA is already required to consult with the Fiscal and Financial Commission and the Minister of COGTA prior to embarking on collective bargaining. SALGA is also required to take into account the budgets of municipalities, the fiscal capacity and efficiency of municipalities and national economic policies, in concluding collective agreements.

73. It is submitted that Section 17B is also unclear on which mandating process will be applicable and the modality of how this will be undertaken.

74. It is further submitted that Section 17B impedes and compromises the rights and ability of municipalities to exercise their executive powers as provided for in the Constitution. Section 17B also undermines the election outcomes in municipalities, as it gives the Committee of Ministers the power to overrule executive decisions of municipalities which are currently governed by various political parties whom citizens have elected to take executive decisions on their behalf.

75. Consequently the practical implication of complying with 17B is far reaching.

76. In addition, considering the wording of Section 17B(2)(b) and the way that the Committee of Ministers is constituted, it is apparent that there is no representation of Local Government but for the Minster responsible for Local Government. The Minster responsible for Local Government plays no part in local government collective bargaining and will not be in any position to defend or otherwise support the collective bargaining decisions and negotiated outcomes in the local government sector. Moreover, the Minster responsible for local government is likely to be consistently outvoted in the Committee of Ministers being the only representative for local government whereas the public service is represented by at least seven Ministers[17]. The composition of the Committee of Ministers is therefore clearly stacked against the local government sector.

77. Therefore it is not unreasonable for the SALGBC to surmise that everything will be done according to the standards set in the public service which means that the collective bargaining outcomes of the Local Government Sector will ultimately be dependent on what agreement is reached at a DPSA level.

78. For example, wage negotiations in the public sector are concluded earlier than in local government as wage increases are implemented on 1 April in the public sector, whereas wage increases in local government are generally implemented on 1 July. It is inevitable that the Committee of Ministers will formulate its mandate for local government wage negotiations based on the settlement reached earlier in the public sector and this is likely to undermine the efficacy of collective bargaining at local government sectoral level.

79. Accordingly, the SALGBC is of the view that it its Collective Bargaining Processes will become redundant and it will not matter what the outcomes of the Collective Bargaining are, as ultimately the decision/mandate will be determined by the Committee of Minsters and none of the parties to collective bargaining are represented in that committee.

80. Should the Committee of Ministers, acting in terms of Section 17B ultimately decide to overrule a wage settlement that was reached between IMATU, SAMWU and SALGA as players in the local government sector and impose its own settlement terms, this may

[17] See Section 17 (3) (b) the Ministers of the DPSA, Finance, Education, Public Enterprises, Defence, Police, Correctional Services and such other Ministers as Cabinet may designate.

potentially destabilise the labour relations environment in the local government sector. Such a decision is likely to be met with much anger, malcontent, dissatisfaction and frustration on the part of union members and this may, in turn, lead to increased incidences of industrial action. This, in a sector that has not had any national industrial action related to wage negotiations for the last 12 years.

81. Considering the above, the SALGBC is of the general view that Section 17B is vague and unconstitutional as it directly impedes on the SALGBC's ability to effectively enter into collective agreements and to give effect to its constitutional responsibility of promoting orderly collective bargaining at Sectoral level. This responsibility is consistent with one of the stated and cardinal Primary Objects of the Labour Relations Act 66 of 1995.

82. The SALGBC parties also wish to put on record that collective bargaining in the local government sector has been relatively stable, compared to other sectors, with no wage strikes for the last 12 years. The DPSA itself stated during an engagement with the SALGBC on 25 January 2022, that it could not identify any faults with the collective bargaining processes and structures of the SALGBC. The parties have also noted that wage negotiations in the PSCBC have in recent years featured legal challenges in the Constitutional Court and a national public sector strike in 2023.

LIMITATIONS OF CONSTITUTIONAL RIGHTS NOT JUSTIFIABLE

83. Overall, the setting of upper limits, the requirement to remove 'disparities', and the provision that collective agreements will be unlawful absent a mandate from a Committee of Ministers overseeing the employer's bargaining agents, limits the capacity of the parties to secure the most favourable deal. This result may be unconstitutional as it infringes on the parties rights in terms of Section 23(5) of the Constitution to engage in collective bargaining.

84. Section 36(1) of the Constitution provides that a limitation of a constitutional right may be justified only if the Court concludes that the limitation of the right, considering the nature and importance of the right and extent of its limitation on the one hand, is justified in relation to the purpose, importance and effect of the provision causing the limitation, taking into account the availability of less restrictive means to achieve the purpose of the provision, on the other.

85. In other words, the reasons for limiting a right need to be exceptionally strong. The South African Constitution permits the limitation of rights by law but requires the limitation to be justifiable. This means that the limitation must serve a purpose that most people would regard as compellingly important.

86. But, however important the purpose of the limitation, restrictions on rights will not be justifiable unless there is good reason for thinking that the restriction would achieve the purpose it is designed to achieve, and that there is no other 'realistically available' way in which the purpose can be achieved without restricting rights.[18]

87. This has no application to infringements of other constitutional rights, such as the constitutional autonomy of local authorities. To the extent that the Bill impermissibly trenches on the constitutional powers of local authorities, it cannot be saved by any 'justifiability' argument.

88. Section 36 lists factors that may be relevant and should be taking into account when the reasonableness and justifiability of the limitation is considered. These include:

    88.1 the nature of the right;

    88.2 the importance of the purpose of the limitation;

    88.3 the nature and extent of the limitation;

    88.4 the relation between the limitation and its purpose; and

    88.5 less restrictive means to achieve the purpose.

89. Having regard to the Memorandum on the objects of the Bill ("the Memorandum"), one of the main purposes of the bill is, "*removing unfair disparities in the public administration by creating a framework within which remuneration and other conditions of service of employees is determined and creating better coordination in the mandating processes for collective bargaining in the public administration*".

90. The Memorandum summarises Sections 17A and 17B as follows:

[18] S v Manamela 2000 (3) SA 1 (CC) [32]

90.1 Section 17A has been included to enable the Minister to prescribe factors to be taken into account by institutions in the public administration; and

90.2 Section 17B further provides a framework for the co-ordination of the mandating process for collective bargaining in the public administration, including public entities;

90.3 These provisions aim to create better integration and co-ordination between the various institutions to remove unjustifiable disparities without eroding existing collective bargaining structures and processes or undermining the prescripts governing employees in the various institutions.

91. The exercise of the discretion of the Committee of Ministers to mandate collective agreements before they can be entered into and considered enforceable, by its nature, undermines the parties' rights to bargain with one another and secure the most favourable deal.

92. In addition, in considering the purpose of the proposed sections, there are less restrictive means to achieve the purpose. Section 16 of PAMA empowers the Minister to prescribe minimum norms and standards regarding, "*any other matter necessary to give effect to the administration or implementation of this Act*".

93. The parties to the collective agreement would therefore be enjoined to comply with the norms and standard. This will remove the necessity of the Committee of Ministers to exercise their discretion in mandating a collective agreement which encroaches on the autonomy of Local Government.

94. As regards the limitations on the constitutional rights to bargain collectively and to strike, the limitations introduced by the revised Bill do not meet the justifiability test:

94.1 Harmonising conditions of service across the public service in all 3 spheres of government is not a constitutionally legitimate objective which can justify limiting the right to bargain collectively and to strike;

94.2 The degree of limitation of the affected constitutional rights is not justifiable; and

94.3 The discretion conferred upon the Committee of Ministers to refuse to mandate municipal employers and unions to conclude a collective agreement is manifestly overbroad and unjustifiable.

DPSA BRIEFINGS TO THE PORTFOLIO COMMITTEE

95. The SALGBC parties have noted that the portfolio committee has received two briefings from the DPSA on the Bill on 2 June 2022 and a more detailed briefing on 7 June 2023.

96. The SALGBC parties are concerned that the DPSA has not provided the portfolio committee with all the relevant and contextual information concerning the Bill and, in some cases, the portfolio committee has been provided with information that is patently incorrect.

96.1 During the 2 June 2022 briefing, the DPSA stated that Sections 17A and 17B merely provide a mandating process for collective bargaining. At no point did the DPSA advise the committee that the Bill empowers a committee of ministers to overturn the negotiation mandates from municipalities, as given to SALGA, in collective bargaining and to impose its own mandate on the sector prior to the conclusion of collective agreements. The DPSA also failed to advise the committee that the Bill proposes to remove SALGA's ability to represent municipalities during collective bargaining by relegating it to being part only of a secondary body known as the inter-governmental forum.

96.2 The DPSA further stated, during the briefing on 2 June 2022, that the comments received by stakeholders during the public consultation process were "*generally supportive of the initiative"* and that there is "*general buy in from the stakeholders".* This statement is factually inaccurate as the SALGBC parties informed the DPSA, in no uncertain terms, at a meeting on 25 January 2022, as well as in subsequent correspondence thereafter, that the SALGBC parties (including SALGA, representing all municipalities) are strongly opposed to Sections 17A and 17B of the Bill. The DPSA was therefore well aware of the strong opposition of an important stakeholder such as the SALGBC and not only did it ignore the SALGBC's objections, but it also failed to inform the portfolio committee thereof.

96.3 During the portfolio committee briefing on 7 June 2022, the DPSA, referring to Section 17B stated only that "*Section 17(b) provides for coordinating mandating processes for collective bargaining in the public administration, including public entities*[19]." At no point did the DPSA advise the committee that words "public administration" is defined in the Bill to include municipalities. This is a shocking omission. The DPSA has failed to advise the portfolio committee that Section 17B is far more than simply a coordinating mandating process. It effectively empowers a committee of ministers to overrule a negotiation mandate received from municipalities and relegates SALGA, the constitutionally mandated representative of municipalities, to being a participant in a secondary body called the intergovernmental forum that the committee of ministers consult with.

97. The failure of the DPSA to provide such important information to the portfolio committee raises serious questions as to whether the DPSA is downplaying the full extent of the impact of Section 17B on municipalities. It also creates the false impression that the Bill does not contemplate any changes to collective bargaining and that it is business as usual as the committee of ministers currently provides the mandate for public sector collective bargaining.

98. The SALGBC parties are therefore concerned that the DPSA appears to be understating, and in some cases, withholding information on the full extent of the impact of the Bill on the collective bargaining structures of the SALGBC as well as the impact on the local government sector during its briefings to the portfolio committee.

99. It is for these reasons that the SALGBC parties have requested an opportunity to make representations to the portfolio committee on the true impact of the Bill, especially with reference to its impact on the local government sector.

SALGBC REQUESTS FOR FURTHER CONSULTATION

100. The SALGBC parties also made several written requests to the DPSA to be further consulted on the Bill. The DPSA neither acknowledged nor responded to these requests.

[19] See Meeting Report: Public Service A/B & Public Administration Management A/B: DPSA briefing; Committee Oversight visit Reports; with Deputy Minister - https://pmg.org.za/committee-meeting/37183/

100.1 On 9 November 2022, the SALGBC's Attorneys sent a written request to the Director General of the DPSA requesting to be consulted separately from NEDLAC. This is due to the fact that not all SALGBC parties are represented at NEDLAC.

100.2 This letter was neither acknowledged nor responded to by the DPSA.

100.3 On 23 February 2023, the SALGBC's Attorneys sent a follow up to the Director General of the DPSA requesting a response to the previous letter and again requesting to be further consulted on the Bill.

100.4 This letter too was neither acknowledged nor responded to by the DPSA.

101. It is unconscionable for the DPSA to ignore requests from the SALGBC parties to be further consulted on a Bill that has such wide ranging and significant implications for the local government sector. The SALGBC parties are seeking to cooperate with the DPSA in good faith in order to ensure that all relevant factors are taken into account in the development of the Bill.

CONCLUSION

102. The proposed new section 17B should be deleted from the Bill. If they are not deleted there is every likelihood of a constitutional challenge to the validity of these provisions.

103. The SALGBC is still of the view that the Bill if assented to, will have an impact on collective bargaining in the municipal sector in a manner which is potentially unconstitutional.