

Enquires: Lance Joel  
Tel: (012) 369- 8000  
Fax: (012) 369 8001  
Cell: 0829083335  
E-mail: [ljoel@salga.org.za](mailto:ljoel@salga.org.za)



## CIRCULAR No. 37 / 2023

FROM : SITHOLE MBANGA  
CHIEF EXECUTIVE OFFICER

TO : SALGA PROVINCIAL CHAIRPERSONS  
EXECUTIVE MAYORS/MAYORS  
COUNCIL SPEAKERS  
MUNICIPAL/CITY MANAGERS

DATE : 6 NOVEMBER 2023

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### UPDATE ON KEY LEGAL MATTERS AFFECTING LOCAL GOVERNMENT

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SALGA, as the representative body of local government, is mandated to provide guidance, advice and, where necessary, initiate or respond to litigation, arbitration and legal disputes, with a view to protect municipalities' rights.

The purpose of this Circular to update municipalities on key active matters that are before the courts.

(i) **SALGA vs Eskom and 13 others**

By way of background, the Political Task Team under the leadership of the Deputy President of the Republic, had resolved to appoint a Facilitator to process and verify the debt owed by Organs of State to municipalities, and in turn the debt owed by municipalities to Eskom. Whilst this process was unfolding in the intergovernmental relations (IGR) arena, the situation became untenable for municipalities who were constantly threatened by disconnections from both Eskom and Water Boards. A number of these matters have also been escalated and ventilated in our courts of law with the resultant consequence of for instance, the attachment of municipal land in Matjhabeng municipality, the bank account of Maluti-a-Phofung municipality and the fleet of Emfuleni municipality.

It is evident that despite SALGA's gallant attempts to amicably resolve this matter in line with the IGR dispute resolution mechanisms, ESKOM has unilaterally elected not to adhere to these arrangements. Similarly, despite agreement that Service Delivery Agreements (SDA) are to be entered into between Eskom and Municipalities, ESKOM further delays implementation by unreasonably raising concerns with the terms and conditions of the SDA. It goes without saying that the proposed SDAs will be worthless if ESKOM refuses to be a contracting party. Based on legal opinions largely contending that municipalities have an exclusive right to electricity reticulation within their jurisdictions, ESKOM's actions has now left SALGA with no other option but to approach the courts for an order declaring ESKOM's supply of electricity within municipal jurisdictions as unconstitutional.

Should the Court find that ESKOM's distribution of electricity within municipal areas is indeed unconstitutional, then the court may make a just and equitable order in terms of section 172(1)(b) directing that ESKOM hand over distribution of electricity within municipal areas to the relevant municipalities alternatively directing that ESKOM enter into SDAs.

The application has been lodged with the High Court. Numerous applications have been initiated by interested parties to join the proceedings. Judgement was handed down by the Pretoria High Court dismissing the Minerals Council and Energy Intensive Users Group joinder application. Soon thereafter, the Minerals Council and Energy Intensive Users Group lodged an Application for Leave to Appeal the erstwhile judgment, which we successfully opposed. The Application for Leave to Appeal was likewise dismissed. The Minerals Council and Energy Intensive Users Group petitioned for Leave to Appeal to the Supreme Court of Appeal.

In the meantime, we received notification from Bertie van Zyl's (a client of ESKOM) attorneys to also join the proceedings.

Due to the delays being occasioned in the matter, an urgent case management meeting was then called by the Deputy Judge President on 14 June 2023, in order to hear the parties' respective submissions to this application. Again, we mentioned to the Deputy Judge President that the joinder applications in this matter was dismissed by this court and is now the subject of a petition to the SCA, which if dismissed, would also negate the hearing of the Bertie van Zyl application. Bertie van Zyl's attorneys argued that the petition to the SCA revived their application and if leave was granted, their application stood to be heard by this Court.

We counter argued that if the petition for Leave was dismissed, this would be the end of this application, and as a safety precaution that we await the outcome of the SCA. Bertie van Zyl's attorneys argued that waiting would lead to further delays which would prejudice their client and requested that SALGA files its Opposing Affidavit in the meantime, whereafter the parties can approach the Deputy Judge President for directives on the filing of Heads of Argument and a hearing date.

We received a directive from the Deputy Judge President on 26 June 2023 directing that SALGA file its Opposing Affidavit, whilst awaiting the outcome of the petition for Leave to Appeal. The Opposing Affidavit was duly drafted and filed. We remain confident regarding our position as we strongly believe that we will be successful as we were in the previous joinder applications. We are

also confident that the SCA will soon issue its ruling and dismiss the petition for leave to appeal, which will ultimately kill of this application.

This matter is ongoing and municipalities will be kept abreast of further developments.

## **(ii) SALGA vs NERSA, ESKOM and others**

By way of background, NERSA on 12 January 2023 granted ESKOM a tariff increase of 18.65% for the 2023/24 financial year and an increase of 12.74% for the 2024/25 financial year. The tariff increase was granted against a backdrop of continuous loadshedding, and the inability of ESKOM to provide continuous bulk services to municipalities.

Several legal challenges have been brought against the NERSA decision. The SALGA National Executive Committee (NEC) Lekgotla of 14 February 2023 deliberated on the matters and resolved that SALGA should, on behalf of local government, challenge the NERSA determination by declaring a formal intergovernmental dispute, as required by the Intergovernmental Relations Framework Act S(41), noting that negotiation and mediation is not possible, given the nature of the decision and the legal context in which it was made.

Following legal advice, SALGA resolved to initiate its own application challenging the NERSA decision. This matter was finally heard from 11 – 15 September 2023. The judgement has been reserved but we remain hopeful that the courts will agree that NERSA's decision taken on 12 January 2023 to approve Eskom's MYPD5 application to increase tariffs for the 2023/2024 and 2024/25 financial years is unconstitutional and should be reviewed and set aside for that reason.

This matter is ongoing and municipalities will be kept abreast of further developments.

## **(iii) South African Municipal Workers Union (SAMWU) vs COGTA & SALGA**

By way of background, the newly amended section 71B (2) of the Systems Act introduces a limitation of political rights of municipal staff, requiring that they may not hold political office in a political party, whether in a permanent, temporary or acting capacity. It further requires that a person who has been appointed as a staff member before the amendment takes effect, must comply within one year of the commencement with the Act.

According to the President's Proclamation (92 of 2022) operation of the Systems Amendment Act commenced on 01 November 2022. Accordingly, section 71B became operational or took effect on 01 November 2022. The impact of section 71B (2) is that any municipal employee who holds political office in a political party prior to section 71B coming into effect must cease holding that office by 01 November 2023. This date has now come, and therefore all municipal employees are required to comply with section 71B (2).

It should also be noted that the constitutionality of section 71B has been challenged by the South African Municipal Workers Union ("SAMWU") at the Johannesburg Labour Court. The constitutional

challenge was brought by SAMWU in **July 2023**. The matter was heard on **12 of October 2023** and judgment was reserved.

Our attention has been drawn to a letter from SAMWU, dated 31 October 2023, sent to municipalities. In this letter SAMWU states that it has advised its members not to resign from holding office in political parties pending the outcome of the constitutional challenge of section 71B at the Labour Court. SAMWU also threatened it would approach the court for an interim interdict owing to the municipalities' conduct. The letter further indicated that dismissal of employees on account of non-compliance with section 71B (2) while judgment is pending, would be inappropriate and patently unfair.

On 02 November 2023, SAMWU carried out its threat of litigation and brought an extremely urgent application wherein it sought an order directing the Minister of Cooperative Governance and Traditional Affairs of South Africa as well as SALGA to postpone the implementation of section 71B pending judgment in the matter where the constitutionality of Section 71B was challenged. The matter was set down for hearing the next day on 03 November 2023.

SALGA opposed the urgent application on inter alia the grounds that SAMWU's urgency was self-created and that the relief sought was flawed because SALGA was not responsible for implementing the provisions of section 71B and therefore could not postpone the implementation of same.

The urgent application came before Judge Mahosi who struck the matter off the roll due to self-created urgency.

It should also be noted that amid the urgent litigation SALGA's attorneys received a letter from the Labour Court that judgment in the application to challenge the constitutional validity of section 71B would be delivered within 10 days [ from 03 November 2023]

In view of the foregoing and the related challenges that may emerge, SALGA sought an urgent legal opinion on the approach municipalities should take regarding implementation of section 71B pending finalisation of the litigation concerning the constitutional validity of section 71B.

The advice sought confirm that in terms of section 172(2) of the Constitution a declaration by the High Court that an Act is unconstitutional has no force until that declaration is confirmed by the Constitutional Court. Seeing as the alleged constitutional invalidity of section 71B has not been confirmed by the Constitutional Court, let alone declared by the Labour Court, **the entire section 71B remains operational and must be complied with.**

By all accounts the result of the constitutional challenge will be known during November 2023. AS SALGA we would welcome the dismissal of the challenge. However, should the Labour Court find the section to be unconstitutional, it may issue an interim order regulating compliance during the period up to confirmation by the Constitutional. If issued, that interim order needs to be complied with by all affected, including municipalities.

Having regard to current circumstances municipalities must not (despite the pending constitutional litigation) hire new employees who hold political office in political parties. Doing so would be

contrary to section 71B (1) and unlawful as a result. Employees who hold political office in political parties, should have resigned from holding such political office by 01 November 2023.

Section 55(1)(p) of the Systems Act places a duty on the municipal managers to implement national and provincial legislation applicable to municipalities. Municipal managers are therefore responsible for implementing [enforcing] section 71B. It is conceivable that municipal managers will enforce compliance with section 71B by first instructing municipal employees who have not complied with section 71B to comply with same and cease holding political office in political parties. If municipal employees fail to comply, the next means of ensuring compliance would be to take disciplinary action against such employees and have them dismissed. This would be in line with the municipal managers' duties to maintain the discipline of staff in terms of section 55(1) (g) of the Systems Act.

It is however open for municipal employees facing the implementation of section 71B or unions of such employees to approach the court to suspend the implementation pending finalisation of the litigation surrounding constitutional validity of the section. But this can only be done [by the courts] in the clearest of cases and after careful consideration of the possibility of harm to the separation of powers principle.

## **STEPS THAT CAN BE TAKEN IN THE IMPLEMENTATION OF SECTION 71B PENDING LITIGATION**

Within the context of the aforementioned legislative obligations, municipalities in our considered view have the following options to consider:-

- **OPTION 1: Enforce compliance with section 71B.**

In view of what is discussed above, until the Constitutional Court has confirmed the invalidity of section 71B municipal managers are legally bound to enforce compliance with section 71B. Only a properly crafted interim interdict restraining municipal managers/municipalities from enforcing section 71B pending confirmation of invalidity by the Constitutional Court would stop the enforcement of the section.

- **OPTION 2: Delay enforcement of compliance with section 71B.**

Because there is no time limit within which to enforce compliance with section 71B where there is non-compliance, municipal managers may as an alternative to enforcement, delay enforcement until the constitutional challenge of section 71B is finalised.

It must be borne in mind however that if the judgment delivered in 10 days is not in SALGA's favour and section 71B is declared unconstitutional, the provisions of the section will, subject to what is stated at paragraph 21 above, still be operational until the Constitutional Court confirms the declaration of constitutional invalidity. The apex Court may take 10 to 12 months to make this confirmation.

This would mean that municipal managers would have to delay the enforcement of the provisions of section 71B by up to 10 to 12 months. By delaying enforcement for such a lengthy period, municipal managers may run the risk of being seen and/or found to be not complying with their

duties under section 55(1)(g) and 55(1)(p) of the Systems Act. In turn this could expose municipal managers to disciplinary action.

These options are placed before municipalities for due consideration, mindful of the implications should either of the options be found favourable.

We are in the interim awaiting the Labour Court ruling and will keep municipalities abreast of development.

Any questions regarding the status of these legal matters should be directed to Provincial Director of Operations of SALGA at provincial offices or to **Mr Lance Joel** at SALGA National Office at email [ljoel@salga.org.za](mailto:ljoel@salga.org.za) or mobile 082 908 3335

Yours sincerely,



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**SITHOLE MBANGA**  
**CHIEF EXECUTIVE OFFICER**