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TO: THE CHAIRPERSON, OCPOL

FROM: NCOP & LEGAL SERVICES UNIT

SUBJECT: LEGAL OPINION: THE CONSTITUTIONAL AND LEGAL IMPLICATIONS OF THE PUBLIC SERVICE AMENDMENT BILL [B13B-2023]

DATE: 25 FEBRUARY 2025

I. INTRODUCTION

The Public Service Amendment Bill [B13B-2023] ("Bill") was passed by the National Assembly and referred to the National Council of Provinces for concurrence on Tuesday, 27 February 2024. After having lapsed due to the elections in 2024, the Bill was revived in terms of NCOP Rule 217 and referred to the Select Committee on Cooperative Governance and Public Administration on 29 July 2024 by the NCOP. It was then formally referred to this Committee by the Speaker in terms of Rule 245[1] of the GPL Standing Rules.

[1] This Rule provides:

"**Formal referral of Section 74 or 76 Bill**

(1) When a Bill referred to in Section 74(1), (2) (3)(b) or Section 76 of the Constitution is introduced or tabled in the NCOP and formally referred to the Speaker by the NCOP, the Speaker must refer the Bill and any accompanying papers to:

(a) the relevant Committee or an Ad hoc Committee; and

(b) the relevant Member of the Executive Council with a request that he or she submit the views of the Executive Council on the Bill to the Committee.

(2) The Secretary must deliver a copy of the Bill immediately to every Member."

This legal opinion seeks to advise the Chairperson and Honorouble Members on the constitutional and legislative implications of the Bill.

In order to facilitate that discussion, we have structured this opinion into five parts. Part I contains this introductory section, Part II sets out the background of the Bill as well as the constitutional and legislative framework underpinning it, in order to place it into context. In the interests of brevity, we have not embarked upon a clause by clause analysis in Part III, however, we have highlighted certain clauses which we thought warranted the Committees attention as it deliberates on this Bill. In Part IV, we provide some guidance on the public participation strategy on this Bill. Lastly, our conclusions and recommendations will be found in Part V.

II. BACKGROUND

Section 76(3) (d) and (f) of the Constitution requires that a Bill must be dealt with in accordance with section 76(1) and (2) if it falls within a functional area listed in Schedule 4 or provides for legislation envisaged in sections 195(3) and (4) and section 197 of the Constitution. This Bill must be dealt with in accordance with the procedure established by section 76 of the Constitution as it is legislation listed in section 76(3) of the Constitution, namely legislation envisaged in sections 195(3) and 197 of the Constitution.

In terms of its long title, this Bill seeks to—

> "To amend the Public Service Act, 1994, to provide for the devolution of administrative powers from executive authorities to heads of department; to augment the role of the Director-General in the Presidency to support the President; to provide for a mechanism to deal with the recovery of overpayments of remuneration and benefits; to clarify the role of the Public Service Commission in respect of grievances; to clarify the role of the President and the Premier in respect of the appointment and career incidents of heads of departments; and to provide for matters connected therewith."

Section 195 of the Constitution sets out certain democratic values and principles that the public administration must be governed by. They are applicable to administration in every sphere of government; organs of state; and public enterprises.[2] These include:

> *"(a)* A high standard of professional ethics must be promoted and maintained.
>
> *(b)* Efficient, economic and effective use of resources must be promoted.
>
> *(c)* Public administration must be development oriented.
>
> *(d)* Services must be provided impartially, fairly, equitably and without bias.
>
> *(e)* People's needs must be responded to, and the public must be encouraged to participate in policymaking.
>
> *(f)* Public administration must be accountable.
>
> *(g)* Transparency must be fostered by providing the public with timely, accessible and accurate information.
>
> *(h)* Good human resource management and career development practices, to maximise human potential, must be cultivated.
>
> *(i)* Public administration must be broadly representative of the South African people, with employment and personnel management practices based on ability, objectivity, fairness, and the need to redress the imbalances of the past to achieve broad representation."

Furthermore, section 195(3) requires that national legislation must ensure the promotion of the values and principles listed in subsection (1). This therefore means that any national legislation that touches on matters of the public administration, must promote these values and principles. Moreover, subsection (6) dictates that the 'nature and functions of different sectors, administrations or institutions of public administration are relevant factors to be taken into account in legislation regulating public administration'.

Section 197 of the Constitution establishes the public service within the public administration.[3] The Public Service Act 103 of 1994, principal Act, was enacted to "provide for the organisation

[2] Section 195(2) of the Constitution.

[3] This section provides:

> "(1) Within public administration there is a public service for the Republic, which must function, and be structured, in terms of national legislation, and which must loyally execute the lawful policies of the government of the day.

and administration of the public service of the Republic, the regulation of the conditions of employment, terms of office, discipline, retirement and discharge of members of the public service, and matters connected therewith."

This constitutional and regulatory framework is primarily the prism through which we analyse this Bill. In the interests of brevity, we have not provided a clause-by-clause analysis on the Bill. However, we have discussed those clauses that we thought warranted closer scrutiny by Honourable Members as they deliberate on this Bill.

III. CLAUSE BY CLAUSE ANALYSIS

Clause 16

Clause 16 proposes for the insertion of section 36A into the principal Act. This clause seeks to limit the political rights of HOD's as well as any employee who directly reports to him/her, by requiring that they may not hold political office[4] in a political party whether in a permanent, temporary or acting capacity. It reads as follows:

> ''Limitation of political rights
>
> **36A.** (1) A head of department or an employee directly reporting to the head of department may not hold political office in a political party, whether in a permanent, temporary or acting capacity.
>
> (2) A person who has been appointed as a head of department or as an employee who directly reports to the head of department before subsection (1) takes

(2) The terms and conditions of employment in the public service must be regulated by national legislation. Employees are entitled to a fair pension as regulated by national legislation.

(3) No employee of the public service may be favoured or prejudiced only because that person supports a particular political party or cause.

(4) Provincial governments are responsible for the recruitment, appointment, promotion, transfer and dismissal of members of the public service in their administrations within a framework of uniform norms and standards applying to the public service."

[4] In terms of Clause 1 of the Bill "Political Office" is defined as follows:

''**"political office"**, in relation to a political party or structure thereof,
means—

(a) the position of chairperson, deputy chairperson, secretary, deputy secretary or treasurer of the party nationally or in a province, region or other area in which the party operates; or

(b) any position in the party equivalent to a position referred to in paragraph *(a)*, irrespective of the title designated to the position;''

effect, must comply with subsection (1) within one year of the commencement of subsection (1).

(3) Except for the limitation of a head of department or an employee directly reporting to the head of department to hold political office, as contemplated in subsection (2), subsection (1) may not be construed as prohibiting a head of department or an employee directly reporting to the head of department from exercising their other political rights as contemplated in section 19 of the Constitution.''.

This clause is specifically applicable to those who hold political office in the upper echelons of a political party. This clause needs to be analysed primarily through the prism of section 19 of the Constitution.[5] Section 19(1) bestows upon every citizen the right to make political choices which include forming a political party; participating in the activities of, or recruit members for, a political party; and to campaigning for a political party or cause. Given our history, this is an important right in our constitutional democracy.[6]

[5] This section provides:

"19 Political rights

(1) Every citizen is free to make political choices, which includes the right

(a) to form a political party;

(b) to participate in the activities of, or recruit members for, a political party; and

(c) to campaign for a political party or cause.

(2) Every citizen has the right to free, fair and regular elections for any legislative body established in terms of the Constitution.

(3) Every adult citizen has the right

(a) to vote in elections for any legislative body established in terms of the Constitution, and to do so in secret; and

(b) to stand for public office and, if elected, to hold office."

[6] In *Ramakatsa and others v Magashule and others* 2013 (2) BCLR 202 (CC) at para 64, the Constitutional Court observed that:

> "During the apartheid order, the majority of people in our country were denied political rights which were enjoyed by a minority. The majority of black people could not form or join political parties of their choice. Nor could they vote for those who were eligible to be members of Parliament. Differently put, they were not only disenfranchised but were also excluded from all decision-making processes undertaken by the government of the day, including those affecting them… The purpose of s19 is to prevent this wholesale denial of political rights to citizens of the country from ever happening again."

In *South African Municipal Workers Union v Minister of Cooperative Governance and Traditional Affairs and Another*[7], the Labour Court had to determine the constitutionality of a similar provision in the Local Government: Municipal Systems Act (the Systems Act) which placed limitations on the rights of municipal employees to hold political office in a political party. Until 2022, that limitation extended only to the echelon of senior management, comprising municipal managers and managers directly accountable to them. In 2022, the Systems Act was amended to provide for the insertion of section 71B.[8] This new section extended the prohibition to all municipal employees, whatever their status. Thus, any employee including technicians, secretaries, receptionists, clerks, gardeners, drivers, cashiers, plumbers and other artisans, librarians and the like, all of whom are far removed from the realm of municipal decision-making, were prohibited from holding office in a political party.[9]

It was not in dispute that the provision constitutes a limitation of the rights in section 19 of the Constitution. Thus, the issue for determination was whether the impugned extension met the threshold of justifiability under section 36 of the Constitution. This requires, among other things, an assessment of the nature and extent of the limitation, the relation between the limitation and its statutory purpose, and whether less restrictive means are available to achieve the same purpose.[10]

In this regard, Van Niekerk J held:

> "the purpose of depoliticizing and professionalising local government is in effect, a call to sanitize decision-making in municipalities from any form of political interference. This is precisely what the narrow limitation, which is neither challenged nor disputed, seeks to do. It bars decision-makers employed by municipalities from holding political

[7] ZALCJHB 323; [2024] 2 BLLR 221 (LC); (2024) 45 ILJ 595 (LC).

[8] Section 71B of the Systems Act provided:

> "71B Limitation of political rights
>
> (1) A staff member may not hold political office in a political party, whether in a permanent, temporary or acting capacity.
>
> (2) A person who has been appointed as a staff member before subsection (1) takes effect, must comply with subsection (1) within one year of the commencement of subsection(1)."

[9] Id at para 2.

[10] Id at para 27.

> office in political parties. The notion that only a complete ban on all staff members from holding political office in a political party will achieve what is an undisputed purpose is an assumption that cannot be sustained on the available evidence."[11] (Emphasis added.)

The Court found that the limitation on the section 19 right imposed by section 71B could not be justifiable under section 36(1) of the Constitution. Thus, section 71B was held to be "unconstitutional to the extent that it denies municipal employees, who are not municipal managers or managers accountable to them, from holding any political office in any political party".[12]

What we can extrapolate from this judgment is that such a limitation would ordinarily be justifiable if it is narrowly targeting the upper echelon of decision making in the administration. This clause seeks to do just that – it is not a blanket limitation, but a narrow one only applicable to the HODs and all those directly accountable to the HODs. It is in this light that we opine that this clause would likely pass constitutional muster if challenged.

Clause 18

This clause seeks to empower the HOD to rectify and recover any incorrect salaries, salary level rewards etc. This administrative power currently resides with the executive authority. It reads as follows:

> ''*(a)* If an incorrect salary, salary level, salary scale or reward is awarded to an employee, the relevant **[executive authority]** head of department shall correct it with effect from the date on which it commenced.'';

Moreover, it seeks to amend section 38(2) (b) of the principal Act. It empowers an accounting officer to recover monies that have been overpaid to an employee by deducting his or her salary provided that certain criteria are met. Firstly, the employee must consent in writing to such deduction. Should the employee withhold such consent then such overpayment may be recovered through legal proceeding

> ''*(b)* been overpaid or received any such other benefit not due to him

[11] Id at para 39.

[12] Id at para 41.

or her—

(i) an accounting officer may recover such overpayment by way of deduction from the employee's salary with the consent, in writing, of the employee and, where no consent is provided, recover such amount of overpayment from the employee by way of legal proceedings;

(iA) an accounting officer shall, in the event that the person is no longer in the employ of a department, recover such amount by way of a deduction from monies owing to such person by the State, with the consent, in writing, of such employee, or by way of legal proceedings;

(iB) an accounting officer shall, in the event that the employee is in the employ of another department, request the accounting officer of that other department to recover, in the manner contemplated in paragraph *(b)*(i), the overpayment made; or

(ii) that other benefit shall be discontinued or withdrawn as from a current date, but the employee concerned shall have the right to be compensated by the State for any patrimonial loss which he or she has suffered or will suffer as a result of that discontinuation or withdrawal.''.

The Constitutional Court in *Public Servants Association obo Ubogu v Head of the Department of Health, Gauteng and Others*,[13] declared section 38(2)(b)(i) of the Public Service Act[14] unconstitutional. This section allowed deductions of overpaid amounts from an employee's salary without their consent or any due process. The Court held that the impugned provision offended the rule of law, in that it permitted self-help and attenuated an employee's procedural

[13] [2017] ZACC 45; 2018 (2) BCLR 184 (CC).

[14] This section provided, in relevant part, as follows:

"(2) If an employee contemplated in subsection (1) has in respect of his or her salary, including any portion of any allowance or other remuneration or any other benefit calculated on his or her basic salary or salary scale or awarded to him or her by reason of his or her basic salary—

(b) been overpaid or received any such other benefit not due to him or her—

(i) an amount equal to the amount of the overpayment shall be recovered from him or her by way of the deduction from his or her salary of such instalments as the relevant accounting officer may determine if he or she is in the service of the State, or, if he or she is not so in service, by way of deduction from any moneys owing to him or her by the State, or by way of legal proceedings, or partly in the former manner and partly in the latter manner;

(ii) that other benefit shall be discontinued or withdrawn as from a current date, but the employee concerned shall have the right to be compensated by the State for any patrimonial loss which he or she has suffered or will suffer as a result of that discontinuation or withdrawal."

rights to fair legal redress, the appropriate remedy should obviate self-help and arbitrary deductions an employee's salary by the state.[15]

Thus, this proposed clause seeks to bring section 38 in line with this Constitutional Court judgment.

IV. PUBLIC PARTICIAPTION

The nature and scope of the Legislature's duty to facilitate public participation set out under section 118(1)(a) of the Constitution is trite and need not be recanvassed here; save to say that this section places a positive duty on provincial legislatures to facilitate public involvement in the legislative and other processes of the legislature and its committees.[16]

The Constitution gives the Legislature a wide discretion on the modalities it chooses to facilitate public involvement. The extent of the facilitation of public participation needed depends upon a number of factors. These include the nature and importance of the legislation and the intensity of its impact on the public – which have been held to be especially relevant.

Ultimately, the important question that Committee needs to ask itself is whether it has taken steps to afford the public a reasonable opportunity to participate effectively in processing this Bill.

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[15] *Obugu* note 13 above, at para 75.

[16] Section 118 of the Constitution provides:

> "(1) A provincial legislature must—
>
> (a) *facilitate public involvement in the legislative and other processes of the legislature and its committees; and*
>
> (b) conduct its business in an open manner, and hold its sittings, and those of its committees, in public, but reasonable measures may be taken—
>
> (i) to regulate public access, including access of the media, to the legislature and its committees; and
>
> (ii) to provide for the searching of any person and, where appropriate, the refusal of entry to, or the removal of, any person.
>
> (2) A provincial legislature may not exclude the public, including the media, from a sitting of a committee unless it is reasonable and justifiable to do so in an open and democratic society." (Own Emphasis)

i. Nature and importance of the Bill

The importance of the Bill is without a doubt undisputed. It seeks to:

> "To amend the Public Service Act, 1994, to provide for the devolution of administrative powers from executive authorities to heads of department; to augment the role of the Director-General in the Presidency to support the President; to provide for a mechanism to deal with the recovery of overpayments of remuneration and benefits; to clarify the role of the Public Service Commission in respect of grievances; to clarify the role of the President and the Premier in respect of the appointment and career incidents of heads of departments; and to provide for matters connected therewith."

It thus impacts on the public service in Gauteng. It is therefore imperative that the public is provided with an opportunity to meaningfully participate in the processing this Bill. In doing so, the Committee must take measures to ensure that the public has the ability to take advantage of the opportunities.

We now move on to provide some guidance on the measures that should be taken by the Committee to ensure compliance with the Constitutional standard set out above.

(b) Modalities

As elucidated above, the Constitution as well as the jurisprudence around public participation does not prescribe the modality that Legislatures must employ in facilitating public participation. Parliament and Legislatures are accorded much deference in that regard. However, those modalities are not immune to judicial scrutiny. They must pass the standard of reasonableness.

In this regard we would propose two modalities to solicit inputs from the public: public hearings and a call for written submissions. The Committee miay want o consider a pre-hearing workshop/ round table discussion prior to the hearing in order to ensure that stakeholders are fully aufait with the contents of the Bill.

ii. Notice

According to the Constitutional Court's jurisprudence, reasonable notice must be at least seven (7) working days. It is advised that such notice period is not exclusively applicable to public hearings or call for written submissions but also includes any pre-hearing workshops.

The notice must also be published in different newspapers of different languages as well as other media platforms. This is to ensure that the word reaches as many affected people as possible.

Further, copies of the Bill, in different languages must be made available to the public prior to the hearings and the workshops e.g. on the GPL's website. This would allow the public to acquaint itself with its content before attending the pre-hearing workshop and the public hearings.

(c) Stakeholders

In *Matatiele Municipality v President of the Republic of South Africa* the Constitutional Court held 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."[17]

This was also reaffirmed in *South African Veterinary Association v Speaker of the National Assembly and Others*[18] at para 43. Thus, in processing a Bill it is important to identify potential targeted stakeholders who are going to be affected by the Bill. Having regard to the nature of the Bill, not only should the general public be invited but an invitation must be extended to

[17] [2006] ZACC 12; 2007 (6) SA 477 (CC); 2007 (1) BCLR 47 (CC) (*Matatiele*) at para 68.

[18] [2018] ZACC 49; 2019 (2) BCLR 273 (CC); 2019 (3) SA 62 (CC).

targeted stakeholders as well. On that score we have provided a number of proposed targeted stakeholders which include:

List of Potential Targeted Stakeholders

- Trade unions
- Public Affairs Research Institute (PARI)
- Public Service Accountability Monitor (PSAM)
- The Ethics Institute (TEI)
- Corruption Watch
- Tertiary institutions

These are just a few suggested stakeholders who may make valuable inputs on this Bill. This is certainly not a closed list, we are sure that PPP will also assist in identifying further relevant stakeholders.

V. CONCLUSION AND RECOMMENDATIONS

In conclusion, it is recommended that the Committee notes our commentary and advice set out above. Furthermore, we look forward to providing assistance and guidance to the Committee during the solicitation of public inputs phase.