

04 March 2019

To: President of the South African Municipal Workers' Union
Minister of Co-Operative Governance & Traditional Affairs
Speaker of the National Assembly
Chairperson of the National Council of Provinces
Premiers of the Nine Provinces of the Republic of South Africa
Chief Executive Officer of the South African Local Government Association

CC: The President of the Republic of South Africa
The Chairperson of the South African Municipal Workers Union

Dear Sirs,

LOCAL GOVERNMENT: MUNICIPAL SYSTEMS AMENDMENT BILL (B2-2019)

OUR REF: SP/LHQ01

YOUR REF: UNKNOWN

1. The abovementioned Bill as well as the Constitutional Court Judgement handed down on 9 March 2017 refers.
2. The Organisation Undoing Tax Abuse (OUTA) is a proudly South African non-profit civil action organisation, comprising of and supported by people who are passionate about improving the prosperity of our nation. OUTA Local was established as a division of OUTA and envisions a prosperous country with an organised, engaged and empowered civil society that ensures responsible use of tax revenues especially at Local Government level.
3. It has come to OUTA Local's attention that certain amendments to the Local Government: Municipal Systems Act¹ (hereinafter referred to as the 'Systems Act') were declared unconstitutional and invalid by the Constitutional Court due

¹ Act 32 of 2000

to procedural irregularities during the enactment of the Amendment Bill². Subsequently, the invalidity was suspended for 24 months in order to allow the legislature time to follow due process and have the amendment properly enacted.

4. As you are aware, the “New Amendment Bill”³ was introduced to the National Assembly on 6 February 2019, an appalling 23 months later and one month shy of the suspension lapsing.
5. Subsequent Stakeholders Engagements were held on 26 and 27 February 2019 and both were attended by an OUTA representative. It would appear from the discussions held by the Stakeholders, that none of the parties intend to approach the constitutional court for an extension of the suspension of the amendments. If the amendments are allowed to lapse it will render the 2011 Amendment invalid and effectively allowing them to become non-existent.
6. After carefully scrutinising the 2011 Amendments, we are of the humble opinion that the repercussions, should the Amendments fall by the way side, are of a serious nature and will have dire legal and practical consequences.
7. In our opinion the amendments provided for much needed clarity, transparency, accountability and oversight. The amendments are of vital importance during a time when our Municipalities are rife with maladministration and mismanagement resulting in communities pulling on the short end of the straw through a lack of service delivery.
8. Although it is commendable that the 2019-Amendment Bill has been tabled and is following due process, one cannot help but wonder why government has

² Local Government: Municipal Systems Amendment Act, 7 of 2011. Hereinafter referred to as the ‘2011-Amendment Act’.

³ Local Government: Municipal Systems Amendment Bill, B2-2019. Hereinafter referred to as the ‘2019-Amendment Bill’.

delayed to the extent that the clarity, transparency, accountability and oversight afforded by the amendments are now in jeopardy.

9. Below serves to demonstrate the veracity of the amendments falling by the way side should the suspension lapse –
 - 9.1 The majority of the direction provided in relation to the appointment, oversight and accountability of Municipal Councils, MEC's and the Minister during the appointment process of Municipal Managers and Managers directly accountable to Municipal Managers (hereinafter referred to as 's56-managers') will be lost.⁴ Although some of the amendments, relating to the process of appointment, are addressed by Regulation⁵, amendments dealing with accountability and oversight will fall away.
 - 9.2 The absence of section 56A of the Systems Act⁶ creates a *lacuna* and allows Municipal Managers and s56-managers to simultaneously hold political office whilst being employed as a high ranking municipal official, as long as they are not remunerated. This creates a conflict between party-political and government/ community interest and cannot be said to be in the best interest of the municipality and ultimately the community.
 - 9.3 Several amendments to section 57 of the Systems Act⁷ resulted in more clarity in the substance of employment contracts and performance agreements for Municipal Managers and s56-managers by providing for set time lines, specific terms and conditions and standards and procedures to form part of such.

⁴ Sections 45A and 56 of the Systems Act as amended by the 2011-Amendment Act.

⁵ Local Government: Regulations on Appointment and Conditions of Employment of Senior Managers, published under GN 21 in GG 37245 of 17 January 2014.

⁶ As inserted by section 5 of the 2011-Amendment Act.

⁷ As amended by section 6 of the 2011-Amendment Act.

- 9.4 The absence of section 57A of the Systems Act⁸ creates a lack of oversight power and duty the MEC and Minister had in respect of the employment of dismissed staff and subsequent record keeping.
- 9.5 The amended section 66 of the Systems Act⁹ provided for the invalidity of a *decision* to employ a person in a post that has not been properly established and for the personal liability for fruitless and wasteful expenditure resulting from such an appointment.
- 9.6 Oversight, negotiation and enforcement of Bargaining Council Agreements¹⁰ are more effectively and inclusively addressed by the amended Act which again promotes accountability, oversight and cooperative governance.
- 9.7 Since the addition of section 72(2A) to the Systems Act¹¹, the Minister of CoGTA had the authority to determine Upper Limits of Total Remuneration Packages Payable to Municipal Managers and Managers Directly Accountable to Municipal Managers. This section was the empowering section for the determination and without it the Minister will not be empowered to make the determination and thus no increases to total remuneration packages will be allowed. Although OUTA is opposed to these increases and in principle agrees with the amendment not being included resulting in no increases, it may be noteworthy to mention that this will likely cause discontent with Municipal Managers and s56-managers accustomed to these increases.
- 9.8 Oversight and accountability in respect of non-performance and maladministration¹² was strengthened by empowering the Minister to intervene where the MEC fails to investigate and further to inform the President of the investigation and its outcomes.

⁸ As inserted by section 7 of the 2011-Amendment Act.

⁹ As amended by section 8 of the 2011-Amendment Act.

¹⁰ Section 71 of the Systems Act as amended by section 10 of the 2011-Amendment Act.

¹¹ As inserted by section 11(g) of the 2011-Amendment Act.

¹² Section 106(5) of the Systems Act as amended by section 13 of the 2011-Amendment Act.

- 9.9 The accountability of councillors sitting on a municipal council or a committee of a council is strengthened by the inclusion of item 2A to Schedule 1 to the Systems Act as it prohibits a councillor from voting in favour of a resolution which conflicts with legislation applicable to local government. Voting in favour of such an unlawful resolution would amount to a breach of the Code of Conduct and subsequent disciplinary action may be taken against the councillor.
10. The above mentioned is not exhaustive nor are the impairment caused by the impending abatement of the 2011-Amendment Act without a contingency plan in place.
11. Kindly take note, that OUTA intends to fully engage during the public participation phase of the 2019-Amendment Bill and eagerly await it's publishing for comment.
12. In the meantime, however, we are perturbed by the possible consequences and hereby request clarity on the following matters:
- 12.1 Whether government or any of the parties involved in the Constitutional Court matter are intending on approaching the honourable court for an extension of the suspension of invalidity?
- 12.2 In the event that no extension will be sought, what are the precautionary steps put in place to prevent ensuing confusion and abuse of power and processes in the interim, pending the enactment of the 2019-Amendment Bill?
- 12.3 Finally, whether the person/ office/ committee responsible for the improper process being followed has been investigated and held accountable?
13. Kindly contact our legal manager, Ms. S Venter at soretha.venter@outa.co.za, in the event of any queries.

14. We trust you appreciate the urgency and importance of the matter and hereby request a response *before* close of business on Friday, **8 March 2019**.

15. We trust that you find the above in order and look forward to receiving your response.

Yours Sincerely,



Stefanie Fick

Chief Legal Officer

OUTA – Organisation Undoing Tax Abuse

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