

REPUBLIC OF SOUTH AFRICA

LOCAL GOVERNMENT: MUNICIPAL SYSTEMS AMENDMENT BILL

*(As introduced in the National Assembly as a section 75 Bill; explanatory summary of Bill
published in Government Gazette No. 25344 of 11 August 2003)
(The English text is the official text of the Bill)*

(MINISTER FOR PROVINCIAL AND LOCAL GOVERNMENT)

[B 49—2003]

ISBN 0 621 33869 9

No. of copies printed 1 800

GENERAL EXPLANATORY NOTE:

[] Words in bold type in square brackets indicate omissions from existing enactments.

_____ Words underlined with a solid line indicate insertions in existing enactments.

BILL

To amend the Local Government: Municipal Systems Act, 2000, so as to delete certain definitions and insert others; to make new provision regarding the assignment of additional functions or powers to municipalities; to provide for the submission of annual performance reports by municipalities, and to provide for the establishment of municipal entities; and to provide for matters connected therewith.

BE IT ENACTED by the Parliament of the Republic of South Africa, as follows:—

Amendment of section 1 of Act 32 of 2000, as amended by section 35 of Act 51 of 2002

1. Section 1 of the Local Government: Municipal Systems Act, 2000 (hereinafter referred to as the principal Act), is hereby amended by—

(a) the insertion after the definition of “basic municipal services” of the following definition:

“**‘board of directors’**, in relation to a municipal entity, means the board of directors of the entity;”;

(b) the insertion after the definition of “executive authority” of the following definition:

“**‘external service provider’** means an external mechanism referred to in section 76(b) which provides a municipal service for a municipality;”;

(c) the insertion after the definition of “Minister” of the following definition:

“**‘multi-jurisdictional service utility’** means a body established in terms of section 87;”;

(d) the substitution for the definition of “municipal entity” of the following definition:

“**‘municipal entity’** means —

(a) [a company, co-operative, trust, fund or any other corporate entity established in terms of any applicable national or provincial legislation and which operates under the ownership control of one or more municipalities, and includes, in the case of a company under such ownership control, any subsidiary of that company] a private company referred to in section 86B(1)(a); [or]

- (b) a service utility; or
- (c) a multi-jurisdictional service utility;”;
- (e) the insertion after the definition of “municipal entity” of the following definition:
 - “**‘Municipal Finance Management Act’** means the Local Government: Municipal Finance Management Act, 2003, and any regulations made under that Act;”;
- (f) the insertion after the definition of “national organ of state” of the following definition:
 - “**‘National Treasury’** means the National Treasury established by section 5 of the Public Finance Management Act, 1999 (Act No. 1 of 1999);”;
- (g) the insertion after the definition of “organ of state” of the following definition:
 - “**‘parent municipality’**—
 - (a) in relation to a municipal entity which is a private company wholly owned by a single municipality, means the municipality which wholly owns the entity;
 - (b) in relation to a municipal entity which is a private company owned by more than one municipality or by one or more municipalities and one or more national or provincial organs of state, means each municipality which has an interest in the company;
 - (c) in relation to a municipal entity which is a service utility, means the municipality which established the entity; or
 - (d) in relation to a municipal entity which is a multi-jurisdictional service utility, means each municipality which is a party to the agreement which established the service utility;”;
- (h) the deletion of the definition of “ownership control”;
- (i) the insertion after the definition of “prescribe” of the following definition:
 - “**‘private company’** means a company referred to in sections 19 and 20 of the Companies Act, 1973 (Act No. 61 of 1973);”;
- (j) the substitution for the definition of “service utility” of the following definition:
 - “**‘service utility’** means [a municipal entity established in terms of section 82(1)(c)] a body established in terms of section 86I;”.

Substitution of section 9 of Act 32 of 2000

2. The following section is hereby substituted for section 9 of the principal Act:

“Assignment of additional function or power to municipalities by Act of Parliament or provincial Act

9. (1) A Cabinet member or Deputy Minister seeking to initiate the assignment of an additional function or power by way of an Act of Parliament to municipalities must, at least 180 days before the draft legislation providing for the assignment is submitted to Cabinet—

- (a) request the Financial and Fiscal Commission to assess the financial implications of the legislation; and
- (b) consult the Minister, the Minister of Finance and organised local government representing local government nationally with regard to—
 - (i) the assessment by the Financial and Fiscal Commission contemplated in paragraph (a);
 - (ii) the policy goals to be achieved by the assignment and the reasons for utilising assignment as the preferred option;
 - (iii) the financial implications of the assignment projected over at least three years;
 - (iv) any possible financial liabilities or risks after the three-year period referred to in subparagraph (iii);

- (v) the manner in which additional expenditure by municipalities as a result of the assignment will be funded;
 - (vi) the implications of the assignment for the capacity of municipalities;
 - (vii) the assistance and support that will be provided to municipalities in respect of the assignment; and
 - (viii) any other matter that may be prescribed.
- (2) An MEC seeking to initiate the assignment of an additional function or power by way of a provincial Act to municipalities in the province must, before the draft legislation providing for the assignment is submitted to the Executive Council of the province concerned—
- (a) request the Financial and Fiscal Commission to assess the financial implications of the legislation; and
 - (b) consult the MEC responsible for finance, the MEC for local government and organised local government representing local government in the province with regard to —
 - (i) the assessment by the Financial and Fiscal Commission contemplated in paragraph (a);
 - (ii) the policy goals to be achieved by the assignment and the reasons for utilising assignment as the preferred option;
 - (iii) the financial implications of the assignment projected over at least three years;
 - (iv) any possible financial liabilities or risks after the three-year period referred to in subparagraph (iii);
 - (v) the manner in which additional expenditure by municipalities as a result of the assignment will be funded;
 - (vi) the implications of the assignment for the capacity of municipalities;
 - (vii) the assistance and support that will be provided to municipalities in respect of the assignment; and
 - (viii) any other matter that may be prescribed.
- (3) When draft legislation referred to in subsection (1) or (2) is introduced in Parliament or a provincial legislature, the legislation must be accompanied by—
- (a) a memorandum—
 - (i) giving at least a three-year projection of the financial implications of that function or power for those municipalities;
 - (ii) disclosing any possible financial liabilities or risks after the three-year period; and
 - (iii) indicating how any additional expenditure by those municipalities will be funded; and
 - (b) the assessment by the Financial and Fiscal Commission referred to in subsection (1)(a) or (2)(a), as the case may be.”.

Substitution of section 10 of Act 32 of 2000

3. The following section is hereby substituted for section 10 of the principal Act:

“Assignment of additional function or power to municipality in terms of legislation or by agreement

- 10.** If an additional function or power is assigned to a municipality in terms of a power contained in an Act of Parliament or a provincial Act, or by agreement in terms of section 99 or 126 of the Constitution, the organ of state assigning the function or power must, before assigning the function or power, submit to the Minister and the National Treasury a memorandum —
- (a) giving at least a three-year projection of the financial implications of that function or power for the municipality; and
 - (b) disclosing any possible financial liabilities or risks after the three-year period; and
 - (c) indicating how any additional expenditure by the municipality will be funded.”.

Insertion of section 10A in Act 32 of 2000

4. The following section is hereby inserted in the principal Act after section 10:

“Funding and capacity building

- 10A.** The Cabinet member, MEC or other organ of state initiating an assignment of an additional function or power to a municipality in terms of section 9 or 10, must take appropriate steps to ensure sufficient funding, and such capacity-building initiatives as may be needed, for the performance of the assigned function or power by the municipality if —
- (a) the assignment of the function or power imposes a duty on the municipality;
 - (b) that duty falls outside the functional areas listed in Part B of Schedule 4 or Part B of Schedule 5 to the Constitution or is not incidental to any of those functional areas; and
 - (c) the performance of that duty has financial implications for the municipality.”.

Insertion of section 15A in Act 32 of 2000

5. The following section is hereby inserted in the principal Act after section 15:

“Regulations and guidelines regarding assignment of functions

- 15A.** (1) The Minister may in terms of section 120 make regulations or issue guidelines concerning—
- (a) capacity that must exist in a municipality before an assignment in terms of section 9 or 10 may be effected;
 - (b) the timing of any assignment in terms of section 9 or 10;
 - (c) timeframes for the restructuring of a municipality’s administration as a result of an assignment in terms of section 9 or 10; and
 - (d) any other matter that it is necessary to prescribe in order to facilitate the application of sections 9 to 10A.
- (2) When making regulations or issuing guidelines in terms of section 120 to provide for or to regulate the matters mentioned in subsection (1) the Minister must—
- (a) take into account the capacity of municipalities to give effect to an assignment in terms of section 9 or 10; and
 - (b) differentiate between different kinds of municipalities according to their respective capacities.”.

Insertion of section 21A in Act 32 of 2000

6. The following section is hereby inserted in the principal Act after section 21:

“Documents to be made public

- 21A.** (1) All documents that must be made public by a municipality in terms of this Act, the Municipal Finance Management Act or other applicable legislation must be conveyed to the local community—
- (a) by displaying the document on the municipality’s official website if the municipality has a website;
 - (b) by displaying the document at the municipality’s head and branch offices and libraries; and
 - (c) by notifying the local community in accordance with section 21 of the place, including the website address if in existence, where detailed particulars concerning the document can be obtained.
- (2) If appropriate, any notification in terms of subsection (1)(c) must invite the local community to submit written comments or representations to the municipality in respect of the relevant document.”.

Substitution of section 46 of Act 32 of 2000

7. The following section is hereby substituted for section 46 of the principal Act:

“Annual performance reports

- 46.** (1) A municipality must prepare for each financial year a performance report reflecting—
- (a) the performance of the municipality and of each service provider during that financial year;
 - (b) a comparison of the performances referred to in paragraph (a) with targets set for and performances in the previous financial year;
 - (c) the development and service delivery priorities and the performance targets set by the municipality for the next financial year; and
 - (d) measures that were taken to improve performance.
- (2) An annual performance report must form part of the municipality’s annual report in terms of Chapter 12 of the Municipal Finance Management Act.”.

Amendment of section 55 of Act 32 of 2000

8. Section 55 of the principal Act is hereby amended by the substitution in subsection (2) for paragraph (c) of the following paragraph:

- “(c) proper and diligent compliance with **[applicable municipal finance management legislation]** the Municipal Finance Management Act.”.

Amendment of section 57 of Act 32 of 2000

9. Section 57 of the principal Act is hereby amended—

- (a) by the substitution in subsection (2) for paragraph (a) of the following paragraph:

“(a) be concluded within a reasonable time after a person has been appointed as the municipal manager or as a manager directly accountable to the municipal manager, and thereafter, **[within]** at least one month **[after]** before the beginning of the financial year of the municipality;”;
- (b) by the insertion after subsection (4) of the following subsection:

“(4A) The provisions of the Municipal Finance Management Act conferring responsibilities on an accounting officer must be regarded as forming part of the performance agreement of a municipal manager.”.

Repeal of section 58 of Act 32 of 2000

10. Section 58 of the principal Act is hereby repealed.

Amendment of section 74 of Act 32 of 2000

11. Section 74 of the principal Act is hereby amended by the substitution for subsection (1) of the following subsection:

- “(1) A municipal council must adopt and implement a tariff policy on the levying of fees for municipal services provided by the municipality itself or by way of service delivery agreements, and which complies with the provisions of this Act, the Municipal Finance Management Act and **[with]** any other applicable legislation.”.

Amendment of section 78 of Act 32 of 2000

12. Section 78 of the principal Act is hereby amended—

- (a) by the substitution for subsection (3) of the following subsection:

“(3) If a municipality decides in terms of subsection (2)(b) to explore the possibility of providing the municipal service through an external mechanism it must—

- (a) give notice to the local community of its intention to explore the provision of the service through an external mechanism; **[and]**
- (b) assess the different service delivery options in terms of section 76(b), taking into account— 5
- (i) the direct and indirect costs and benefits associated with the project, including the expected effect of any service delivery mechanism on the environment and on human health, well-being and safety;
 - (ii) the capacity and potential future capacity of prospective service providers to furnish the skills, expertise and resources necessary for the provision of the service; 10
 - (iii) the views of the local community;
 - (iv) the likely impact on development and employment patterns in the municipality; and 15
 - (v) the views of organised labour; and
- (c) conduct or commission a feasibility study which must include—
- (i) a clear identification of the municipal service for which the municipality intends to consider an external mechanism; 20
 - (ii) an indication of the number of years for which the provision of the municipal service through an external mechanism might be considered; 25
 - (iii) the projected outputs the provision of the municipal service through an external mechanism might be expected to produce;
 - (iv) the projected impact on the municipality's staff, assets and liabilities; 30
 - (v) the projected impact on the municipality's integrated development plan;
 - (vi) the projected impact on the municipality's future budgets, for each year for which an external mechanism might be used, including impacts on revenue, expenditure, borrowing and debt; 35
 - (vii) the projected impact on the municipality, and its residents and customers, including impacts on tariffs, grants, dividends, subsidies and service delivery;
 - (viii) a comparison of the advantages and disadvantages of internal mechanisms, against the various kinds of external mechanisms that may be used for the provision of the municipal service; 40
 - (ix) the strategic and operational costs and benefits of an external mechanism in terms of the municipality's strategic objectives; 45
 - (x) an assessment as to the extent to which the provision of the municipal service through an external mechanism will—
 - (aa) provide value for money; 50
 - (bb) address the needs of the poor;
 - (cc) be affordable for the municipality and residents; and
 - (dd) transfer appropriate technical, operational and financial risk; and 55
 - (xi) an assessment of the municipality's capacity to effectively monitor the provision of the municipal service through an external mechanism and to enforce the service delivery agreement.”; and
- (b) by the addition of the following subsection: 60
- “(6) The national government or relevant provincial government may assist municipalities in carrying out a feasibility study referred to in subsection (3)(c), or in preparing service delivery agreements.”.

Substitution of section 80 of Act 32 of 2000

13. The following section is hereby substituted for section 80 of the principal Act:

“Provision of services through service delivery agreements with external mechanisms

- 80.** (1) If a municipality decides to provide a service through a service delivery agreement in terms of section 76(b) with—
- (a) a municipal entity or another municipality **[or a national or provincial organ of state]**, it may negotiate and enter into such an agreement with the relevant municipal entity or municipality **[or organ of state]** without applying Part 3 of this Chapter; **[or]**
 - (aA) a national or provincial organ of state, it may, subject to subsections (3), (4) and (5), enter into such an agreement with the relevant organ of state without applying Part 3 of this Chapter; or
 - (b) any institution or entity, or any person, juristic or natural, not mentioned in paragraph (a) or (aA), it must apply Part 3 of this Chapter before entering into such an agreement with any such institution, entity or person.
- (2) Before a municipality enters into a service delivery agreement **[for a basic municipal service]** with an external service provider it must establish a **[mechanism and]** programme for community consultation and information dissemination regarding the appointment of the external service provider and the contents of the service delivery agreement. The contents of a service delivery agreement must be communicated to the local community through the media.
- (3) If a municipality identifies the utilisation of a national or provincial organ of state as the preferred option, the service delivery agreement with such organ of state may be negotiated only after the organ of state has secured the approval of—
- (a) the Minister;
 - (b) the Minister of Finance;
 - (c) any other Cabinet member whose portfolio is affected by the service delivery agreement; and
 - (d) the executive authority responsible for the organ of state in terms of the Public Finance Management Act, 1999 (Act No. 1 of 1999).
- (4) Before the approval referred to in subsection (3) may be given, the organ of state must conduct or commission a feasibility study which must include—
- (a) an assessment on the impact on the budget of the organ of state, and on its assets, liabilities and staff expenditure, for each of the financial years that it intends to serve as an external service provider;
 - (b) an assessment on whether it will be necessary to increase the number of staff to enable the organ of state to be an external service provider, and whether it will be necessary to transfer or second any staff from the appointing municipality to the organ of state;
 - (c) an assessment on the ability of the organ of state to absorb any commitments, liabilities or employees involved, if and when the appointment as an external service provider ends; and
 - (d) any other relevant information that may be prescribed.
- (5) No national or provincial organ of state may accept an appointment to provide a municipal service on behalf of a municipality unless—
- (a) it is empowered by law to provide that municipal service and has obtained the approval referred to in subsection (3);
 - (b) the provision of the municipal service will not encroach on the geographical, functional or institutional integrity of the local sphere of government;
 - (c) the commitments undertaken by the organ of state in connection with the appointment can be met in terms of its approved budget; and
 - (d) the organ of state determines that it can absorb any commitments, liabilities or employees involved, if and when the appointment as an external service provider ends.”.

Amendment of section 81 of Act 32 of 2000

14. Section 81 of the principal Act is hereby amended—

(a) by the substitution for subparagraph (v) of paragraph (a) of subsection (2) of the following subparagraph:

“(v) managing its own accounting, financial management, budgeting, investment and borrowing activities within a framework of transparency, accountability, reporting and financial control determined by the municipality, subject to **[applicable municipal finance management legislation]** the Municipal Finance Management Act;”; and

(b) by the insertion after paragraph (b) of subsection (2) of the following paragraph:

“(bA) must ensure that the agreement provides for a dispute-resolution mechanism to settle disputes between the municipality and the service provider;”.

Repeal of section 82 of Act 32 of 2000

15. Section 82 of the principal Act is hereby repealed.

Amendment of section 83 of Act 32 of 2000

16. Section 83 of the principal Act is hereby amended by the substitution in subsection (1) for paragraph (a) of the following paragraph:

“(a) **[are competitive, fair, transparent, equitable and cost-effective]** comply with Chapter 10 of the Municipal Finance Management Act;”.

Substitution of heading to Part 4 of Chapter 8 of Act 32 of 2000

17. The following heading is hereby substituted for the heading to Part 4 of Chapter 8 of the principal Act:

“***Part 4: Internal municipal service districts***”.

Insertion of Part 4A in Chapter 8 of Act 32 of 2000

18. The following Part is hereby inserted in the principal Act after section 86:

“***Part 4A: Regulations and guidelines regarding municipal services***”

Regulations and guidelines regarding municipal services

86A. (1) The Minister may for purposes of this Chapter make regulations or issue guidelines in accordance with section 120 to provide for or regulate the following matters:

- (a) The preparation, adoption and implementation of a municipal tariff policy;
- (b) the subsidisation of tariffs for poor households through—
 - (i) cross-subsidisation within and between services;
 - (ii) equitable share allocations to municipalities; and
 - (iii) national and provincial grants to municipalities;
- (c) limits on tariff increases;
- (d) criteria to be taken into account by municipalities when imposing surcharges on tariffs for services and determining the duration thereof;
- (e) incentives and penalties to encourage —
 - (i) the economical, efficient and effective use of resources when providing services;
 - (ii) the recycling of waste; and
 - (iii) other environmental objectives;
- (f) criteria to be taken into account by municipalities when assessing options for the provision of a municipal service;
- (g) measures against malpractice in selecting and appointing service providers, including measures against the stripping of municipal assets;

- (h) mechanisms and procedures for the co-ordination and integration of sectoral requirements in terms of legislation with this Chapter, and the manner in which municipalities must comply with these;
 - (i) standard draft service delivery agreements;
 - (j) performance guarantees by service providers; and
 - (k) any other matter that would facilitate —
 - (i) the effective and efficient provision of municipal services; or
 - (ii) the application of this Chapter.
- (2) The Minister may only make regulations and issue guidelines contemplated in subsection (1)(a) to (e) after consulting with the Minister of Finance and any other Cabinet member whose portfolio is affected by such regulations and guidelines.
- (3) When making regulations or issuing guidelines in terms of section 120 to provide for or regulate the matters mentioned in subsection (1), the Minister must—
- (a) take into account the capacity of municipalities to comply with such regulations and guidelines; and
 - (b) differentiate between different kinds of municipalities according to their respective capacities.”.

Insertion of headings and sections 86B, 86C, 86D, 86E, 86F, 86G, 86H, 86I, 86J, 86K and 86L in Act 32 of 2000

19. The following headings and sections are hereby inserted in the principal Act after section 86A:

“CHAPTER 8A

MUNICIPAL ENTITIES

Part 1: General provisions

Kinds of municipal entities

- 86B.** (1) The kinds of municipal entities recognised by this Act are—
- (a) a private company—
 - (i) established by one or more municipalities in terms of Part 2; or
 - (ii) in which one or more municipalities have acquired or hold an interest in terms of Part 2;
 - (b) a service utility established by a municipality in terms of Part 3; and
 - (c) a multi-jurisdictional service utility established by two or more municipalities in terms of Part 4.
- (2) A municipality may only establish or participate in the establishment of or acquire or hold an interest in a corporate body, including a trust, where such corporate body is—
- (a) a private company, service utility or multi-jurisdictional service utility referred to in subsection (1); or
 - (b) a fund for the benefit of its employees in terms of a law regulating pensions or medical aid schemes.
- (3) Subsection (2) does not apply to listed corporate securities acquired by a municipality in accordance with the investment framework envisaged in the Municipal Finance Management Act.

Code of Conduct for directors and members of staff of municipal entity

- 86C.** (1) (a) The Code of Conduct for councillors contained in Schedule 1 applies, with the necessary changes, to the directors of a municipal entity.
- (b) In the application of item 14 of Schedule 1 to directors of a municipal entity, that item must be regarded as providing as follows:

‘Breaches of Code

- 14.** (1) The council of the parent municipality of a municipal entity which appointed or nominated a director of the entity may—
- (a) investigate and make a finding on any alleged breach of a provision of this Code by that director; or
 - (b) establish a special committee—
 - (i) to investigate and make a finding on any alleged breach of a provision of this Code by that director; or
 - (ii) to make appropriate recommendations to the council.
- (2) If the council or special committee finds that the director has breached a provision of this Code, the council may—
- (a) issue a formal warning to the director;
 - (b) reprimand the director;
 - (c) fine the director; or
 - (d) remove or recall the director in terms of section 93G.’.
- (2) The Code of Conduct for municipal staff members contained in Schedule 2 applies, with the necessary changes, to members of staff of a municipal entity.
- (3) For the purposes of this section, any reference in Schedule 1 or 2 to a ‘councillor’, ‘MEC for local government in the province’, ‘municipal council’, ‘municipality’, and ‘rules and orders’ must, unless inconsistent with the context or otherwise clearly inappropriate, be construed as a reference to a director of a municipal entity, parent municipality, board of directors, municipal entity, and procedural rules, respectively.

Part 2: Private companies

Establishment and acquisition of private companies

- 86D.** (1) A municipality may, subject to subsection (2)—
- (a) establish or participate in the establishment of a private company in accordance with the Companies Act, 1973 (Act No. 61 of 1973); or
 - (b) acquire or hold an interest in a private company in accordance with the Companies Act, 1973 (Act No. 61 of 1973).
- (2) A municipality may only acquire or hold an interest in a private company in terms of subsection (1) if the other interests are held by—
- (a) another municipality; or
 - (b) a national or provincial organ of state.
- (3) If a municipality establishes a private company or acquires or holds an interest in such a company, it must comply with the Companies Act, 1973 (Act No. 61 of 1973), and any other law regulating companies, but if any conflict arises between that Act or such law and a provision of this Act, this Act prevails.

Legal status of private companies established by municipalities or in which municipalities hold interests

- 86E.** (1) A private company referred to in section 86D(1)—
- (a) is a municipal entity—
 - (i) if it is wholly owned by a municipality;
 - (ii) if only municipalities have interests in the company; or
 - (iii) if one or more municipalities and one or more national or provincial organs of state have interests in the company and such organs of state do not have ownership control in the company within the meaning of the Public Finance Management Act, 1999 (Act No. 1 of 1999); or
 - (b) is a public entity to which the Public Finance Management Act, 1999 (Act No. 1 of 1999), applies if ownership control in the company, within the meaning of that Act, is held by a national or provincial organ of state.

- (2) A private company which is a municipal entity—
- (a) must restrict its activities to the purpose for which it is used by its parent municipality in terms of section 86F(1)(a); and
 - (b) has no competence to perform any activity which falls outside the competence of its parent municipality.

5

Conditions precedent for establishing or acquiring interests in private companies

86F. (1) A municipality may establish a private company or acquire an interest in such a company only—

- (a) for the purpose of utilising the company as a mechanism to assist it in the performance of any of its functions; 10
- (b) if the municipality can demonstrate that—
 - (i) there is a need to perform that function in accordance with business practices in order to achieve the strategic objectives of the municipality more effectively; and 15
 - (ii) the company would be of economic benefit to the local community; and
- (c) if any other conditions that may be prescribed have been complied with.

(2) If a municipality establishes a private company or acquires an interest in such a company for the purpose of using that company as a mechanism to provide a municipal service, Chapter 8 applies. 20

Conditions precedent for co-owning of private companies

86G. If two or more municipalities intend to establish a private company or to acquire interests in the same private company, each of those municipalities must— 25

- (a) comply with section 86F;
- (b) consider and decide on proposals for shared control of the company; and
- (c) consider cash flow projections of the company's proposed operations for at least three financial years. 30

Disposal of companies and equity interests in companies

86H. A municipality may transfer ownership or otherwise dispose of—

- (a) a wholly owned private company, subject to the Municipal Finance Management Act; or 35
- (b) an interest in a private company —
 - (i) subject to the Municipal Finance Management Act; and
 - (ii) if that transfer or disposal would not result in an infringement of section 86D(2) by another municipality which holds an interest in the company. 40

Part 3: Service utilities

Establishment

86I. (1) A municipality may pass a by-law establishing a service utility.

- (2) A by-law establishing a service utility must—
- (a) state the object for which the service utility is established; 45
- (b) confer the powers and impose the duties on the service utility which are necessary for the attainment of such object;
- (c) provide for—
 - (i) a board of directors to manage the service utility;
 - (ii) the appointment of directors, the filling of vacancies and the replacement and recall of directors by the parent municipality; 50
 - (iii) the number of directors to be appointed;
 - (iv) the terms and conditions of appointment of directors;
 - (v) the appointment of a chairperson;

55

- (vi) the operating procedures of the board of directors;
 - (vii) the delegation of powers and duties to the board of directors consistent with section 92;
 - (viii) any other matter necessary for the proper functioning of the board of directors;
 - (ix) the acquisition of infrastructure, goods, services, supplies or equipment by the service utility, or the transfer of infrastructure, goods, services, supplies or equipment to the service utility;
 - (x) the appointment of staff by the service utility or the transfer or secondment of staff to the service utility in accordance with applicable labour legislation;
 - (xi) the terms and conditions on which any acquisition, transfer, appointment or secondment is made;
 - (xii) the governance of the service utility; and
 - (xiii) any other matter necessary for the proper functioning of the service utility; and
- (d) determine budgetary, funding and scheduling arrangements for implementation of the by-law.
- (3) A by-law made in terms of this section must be consistent with this Act and the Municipal Finance Management Act.
- (4) No by-law may confer on a service utility any functions falling outside the competence of the parent municipality.

Legal status of service utilities

- 86J.** (1) A service utility is a juristic person and a municipal entity under the sole control of the municipality which established it.
- (2) A service utility—
- (a) must restrict its activities to the object for which it was established; and
 - (b) has no competence to perform any activity which falls outside its functions in terms of a by-law of the municipality.

Conditions precedent for establishing service utilities

- 86K.** (1) A municipality may establish a service utility only—
- (a) for the purpose of utilising the service utility as a mechanism to assist the municipality in the performance of any of its functions;
 - (b) if the municipality can demonstrate—
 - (i) that that function could be performed more efficiently by a separate structure in order to achieve the strategic objectives of the municipality; and
 - (ii) that the service utility would benefit the local community; and
 - (c) if all other conditions that may be prescribed have been complied with.
- (2) If a municipality establishes a service utility for the purpose of using that service utility as a mechanism to provide a municipal service, Chapter 8 applies.

Disestablishment of service utilities

- 86L.** (1) A municipality may pass a by-law disestablishing a service utility which it has established.
- (2) If a service utility is disestablished—
- (a) all assets, liabilities, rights and obligations of the service utility vest in the municipality; and
 - (b) staff of the service utility must be dealt with in accordance with applicable labour legislation.

Part 4: Multi-jurisdictional service utilities

Substitution of section 87 of Act 32 of 2000

20. The following section is hereby substituted for section 87 of the principal Act:

“Establishment of multi-jurisdictional [municipal service districts] service utilities

87. Two or more municipalities, by written agreement, may establish **[their respective municipal areas or designated parts of their respective municipal areas as a multi-jurisdictional municipal service district to facilitate the provision of]** a multi-jurisdictional service utility to provide a municipal service or perform another function in **[those]** their municipal areas or **[those]** in any designated parts of their municipal areas.”.

Amendment of section 88 of Act 32 of 2000

21. Section 88 of the principal Act is hereby amended by—

(a) the substitution for the heading of the following heading:

“Minister requesting [the] establishment of multi-jurisdictional [municipal service districts] service utilities”; and

(b) the substitution for subsection (1) of the following subsection:

“(1) The Minister may, in the national interest and in consultation with the **[national Minister]** Cabinet member responsible for the functional area in question, request two or more municipalities to establish **[designated]** a multi-jurisdictional **[municipal service districts]** service utility to conform to the requirements of national legislation applicable to the provision of a specific municipal service.”.

Substitution of section 89 of Act 32 of 2000

22. The following section is hereby substituted for section 89 of the principal Act:

“Contents of agreements establishing multi-jurisdictional [municipal service districts] service utilities

89. **[(1)]** An agreement establishing a multi-jurisdictional **[municipal service district]** service utility must describe the rights, obligations and responsibilities of the **[participating]** parent municipalities, and must—

(a) determine the boundaries of the **[district]** area for which the multi-jurisdictional service utility is established;

(b) identify the municipal service or other function to be provided in terms of the agreement;

[(c) determine the mechanism that will provide the service in the district;]

(d) determine budgetary, funding and scheduling arrangements for implementation of the agreement;

(e) provide for—

(i) **[the establishment of a governing body]** a board of directors for the multi-jurisdictional **[municipal service district]** service utility;

(ii) the appointment of **[representatives of the]** directors by the respective **[participating]** parent municipalities **[to the governing body]**, the filling of vacancies and the replacement and recall of **[representatives]** directors;

(iii) the number of **[representatives]** directors appointed **[for]** by each **[participating]** parent municipality, **[subject to subsection (2)]**;

(iv) the terms and conditions of appointment of **[those representatives]** directors;

(v) the appointment of a chairperson;

- (vi) the operating procedures of the **[governing body]** board of directors;
 - (vii) the delegation of powers and duties to the **[governing body]** board of directors consistent with section 92; and
 - (viii) any other matter relating to the proper functioning of the **[governing body]** board of directors; 5
 - (f) provide for—
 - (i) the acquisition of infrastructure, goods, services, supplies or equipment by the **[governing body]** multi-jurisdictional service utility, or the transfer of infrastructure, goods, services, supplies or equipment to the **[governing body]** multi-jurisdictional service utility; 10
 - (ii) the appointment of staff by the **[governing body]** multi-jurisdictional service utility, or the transfer or secondment of staff to the **[governing body]** multi-jurisdictional service utility in accordance with applicable labour legislation; and 15
 - (iii) the terms and conditions on which any acquisition, transfer, appointment or secondment is made; **[and]**
 - (g) determine the conditions for, and consequences of, the withdrawal from the agreement of a **[participating]** parent municipality; 20
 - (h) determine the conditions for, and consequences of, the termination of the agreement, including—
 - (i) the method and schedule for winding-up the operations of the **[district]** multi-jurisdictional service utility; 25
 - (ii) the distribution of the proceeds; and
 - (iii) the allocation among the **[participating]** parent municipalities of any assets and liabilities;
 - (i) provide for the governing of the multi-jurisdictional service utility; and
 - (j) provide for any other matter necessary for the proper functioning of the multi-jurisdictional service utility. 30
- [(2) A governing body must consist of between three and fifteen representatives.]”.**

Substitution of section 90 of Act 32 of 2000

23. The following section is hereby substituted for section 90 of the principal Act: 35

“Legal status of **[governing bodies] multi-jurisdictional service utilities**

90. (1) [The governing body of a] A multi-jurisdictional **[municipal service district]** service utility is a juristic person, and a municipal entity under the shared control of the participating municipalities.

(2) A multi-jurisdictional service utility — 40

(a) must restrict its activities to the object for which it was established; and

(b) has no competence to perform any activity which falls outside its functions in terms of the agreement referred to in section 87.”.

Repeal of section 91 of Act 32 of 2000 45

24. Section 91 of the principal Act is hereby repealed.

Substitution of section 92 of Act 32 of 2000

25. The following section is hereby substituted for section 92 of the principal Act:

“Control of **[governing bodies of] multi-jurisdictional **[municipal service districts]** service utilities** 50

92. (1) [The governing body of a] A multi-jurisdictional **[municipal service district]** service utility —

(a) is accountable to the participating municipalities; and

- (b) must comply with **[any legislation applicable to the financial management of municipalities and municipal entities]** the Municipal Finance Management Act.
- (2) A participating municipality —
 - (a) is entitled to receive such regular written reports from the **[governing body of a district]** multi-jurisdictional service utility with respect to its activities and performance, as may be set out in the agreement establishing the **[governing body]** multi-jurisdictional service utility; 5
 - (b) may request the **[governing body]** multi-jurisdictional service utility to furnish it with such information regarding its activities as the participating municipality may reasonably require; and 10
 - (c) may appoint a nominee to inspect, at any time during normal business hours, the books, records, operations and facilities of the **[governing body]** multi-jurisdictional service utility, and **[of]** those 15 of its contractors relating to the provision of the municipal service or the performance of the function for which the **[district]** multi-jurisdictional service utility is established.”.

Substitution of section 93 of Act 32 of 2000

26. The following section is hereby substituted for section 93 of the principal Act: 20

“Termination of multi-jurisdictional [municipal service districts] service utilities

93. A multi-jurisdictional **[municipal service district]** service utility terminates —

- (a) automatically, when there is only one remaining participating municipality; 25
- (b) by written agreement among all of the participating municipalities; or
- (c) upon the termination date or the fulfilment of any condition for termination contained in the agreement establishing the **[district]** 30 multi-jurisdictional service utility.”.

Insertion of parts 5, 6 and 7 in Chapter 8A of Act 32 of 2000

27. The following Parts are hereby inserted in Chapter 8A of the principal Act after section 93:

“Part 5: Duties and responsibilities of parent municipalities 35

Duties of parent municipalities with respect to municipal entities

- 93A.** The parent municipality of a municipal entity —
- (a) must exercise any shareholder, statutory, contractual or other rights and powers it may have in respect of the municipal entity to ensure that — 40
 - (i) both the municipality and the municipal entity comply with this Act, the Municipal Finance Management Act and any other applicable legislation; and
 - (ii) the municipal entity is managed responsibly and transparently, and meets its statutory, contractual and other obligations; 45
 - (b) must allow the board of directors and chief executive officer of the municipal entity to fulfil their responsibilities; and
 - (c) must establish and maintain clear channels of communication between the municipality and the municipal entity. 50

Parent municipalities having sole control

- 93B.** A parent municipality which has sole control of a municipal entity—
- (a) must establish annual performance objectives and indicators for the municipal entity; 5
 - (b) must monitor and annually review the performance of the municipal entity against the established performance objectives and indicators; and
 - (c) may liquidate and disestablish the municipal entity—
 - (i) following an annual performance review, if the performance of the municipal entity is unsatisfactory; or 10
 - (ii) if the municipal entity experiences serious or persistent financial problems and the municipality does not impose a financial recovery plan in terms of the Municipal Finance Management Act. 15

Parent municipalities having shared control

- 93C.** Parent municipalities that have shared control of a municipal entity—
- (a) must enter into a mutual agreement determining and regulating —
 - (i) their mutual relationships in relation to the municipal entity; 20
 - (ii) the exercise of any shareholder, contractual or other rights and powers they may have in respect of the municipal entity;
 - (iii) the exercise of their powers and functions in terms of this Act and the Municipal Finance Management Act with respect to the municipal entity; 25
 - (iv) the establishment of annual performance objectives and indicators for the municipal entity;
 - (v) the monitoring and annual review of the performance of the municipal entity against the established performance objectives and indicators; 30
 - (vi) the payment of any monies by the municipalities to the entity or by the municipal entity to the municipalities;
 - (vii) procedures for the resolution of disputes between those municipalities;
 - (viii) procedures governing the conditions for and consequences of withdrawal from the municipal entity by a municipality; 35
 - (ix) procedures for terminating the appointment and utilisation of the municipal entity as a mechanism for the performance of a municipal function, including its disestablishment, the division, transfer or liquidation of its assets and the responsibility for its liabilities; and 40
 - (x) any other matter that may be prescribed; and
 - (b) may liquidate and disestablish the municipal entity—
 - (i) following an annual performance review, if the performance of the municipal entity is unsatisfactory; or 45
 - (ii) if the municipal entity experiences serious or persistent financial problems and the municipalities do not impose a financial recovery plan in terms of the Municipal Finance Management Act.

Municipal representatives

- 93D.** (1) The municipal manager of the parent municipality of a municipal entity, or any official designated by the municipal manager, is the representative of the municipality—
- (a) to receive communications from the municipal entity; and
 - (b) if the municipal entity is a private company, to attend shareholder meetings and to exercise the municipality's rights and responsibilities as a shareholder. 55

- (2) A municipal representative—
 - (a) must act in accordance with the instructions of the council; and
 - (b) may be reimbursed for expenses in connection with his or her duties as a municipal representative, but may not receive any additional compensation or salary for such duties.
- (3) A municipal representative must represent the parent municipality faithfully, without consideration of personal interest or gain, and must keep the council informed of—
 - (a) the substance of all communications between the municipal entity and the municipality;
 - (b) how voting rights were exercised; and
 - (c) all relevant actions taken on behalf of the municipality.

Part 6: Governance of municipal entities

Appointment of directors

- 93E.** (1) The board of directors of a municipal entity—
- (a) must have the requisite range of expertise to effectively manage and guide the activities of the municipal entity;
 - (b) must include non-executive directors; and
 - (c) may have a non-executive chairperson.
- (2) The parent municipality of a municipal entity must, before nominating or appointing a director, establish a process through which—
- (a) applications for nomination or appointment are widely solicited;
 - (b) a list of all applicants and any prescribed particulars concerning applicants is compiled; and
 - (c) the municipal council makes the appointment or nomination from such list.

Disqualifications

- 93F.** (1) A person is not eligible to be a director of a municipal entity if he or she—
- (a) holds office as a councillor of any municipality;
 - (b) has a private or business interest in the activities of the relevant municipal entity otherwise than as a director of the municipal entity;
 - (c) was convicted of any offence and sentenced to imprisonment without the option of a fine, and a period of five years since the conviction has not elapsed;
 - (d) has been declared by a court to be of unsound mind; or
 - (e) is an unrehabilitated insolvent.
- (2) An official of a parent municipality may be a director of a municipal entity under the sole or shared control of that municipality, but may not be the chairperson of the board of directors.
- (3) If a director of a municipal entity during that person's term of office becomes disqualified on a ground mentioned in subsection (1), such person ceases to be a director from the date of becoming disqualified.

Removal or recall of directors

- 93G.** The parent municipality of a municipal entity may remove or recall a director appointed or nominated by that municipality—
- (a) if the performance of the director is unsatisfactory;
 - (b) if the director, either through illness or for any other reason, is unable to perform the functions of office effectively;
 - (c) if the director, whilst holding office—
 - (i) is convicted of fraud or theft or any offence involving fraudulent conduct; or
 - (ii) has failed to comply with or breached any legislation regulating the conduct of directors, including any applicable code of conduct; or

- (d) if the director is an official of a municipality and is disciplined or convicted for financial misconduct in terms of Chapter 15 of the Municipal Finance Management Act.

Duties of directors

- 93H.** (1) The board of directors of a municipal entity must— 5
- (a) provide effective, transparent, accountable and coherent corporate governance and conduct effective oversight of the affairs of the municipal entity;
 - (b) ensure that it and the municipal entity comply with all applicable legislation and agreements; 10
 - (c) communicate openly and promptly with the parent municipality of the municipal entity; and
 - (d) deal with the parent municipality of the municipal entity in good faith.
- (2) A director must—
- (a) disclose to the board of directors, and to the representative of the parent municipality, any direct or indirect personal or business interest that the director or his or her spouse or partner may have in any matter before the board, and must withdraw from the proceedings of the board when that matter is considered, unless the board decides that the director's direct or indirect interest in the matter is trivial or irrelevant; 15
 - and
 - (b) at all times act in accordance with the Code of Conduct for directors referred to in section 86C. 20

Meetings of board of directors

- 93I.** (1) Meetings of the board of directors of a municipal entity must be open to the municipal representatives referred to in section 93D and the accounting officers of the parent municipalities. 25
- (2) Municipal representatives and accounting officers only have observer status in a meeting of the board of directors of a municipal entity.

Appointment of chief executive officer

- 93J.** (1) The board directors of a municipal entity must appoint a chief executive officer of the municipal entity. 30
- (2) The chief executive officer of a municipal entity is accountable to the board of directors for the management of the municipal entity.

Part 7: General

Establishment of and acquisition of interests in corporate bodies disallowed

- 93K.** (1) No municipal entity may—
- (a) establish or participate in the establishment of a company or any other corporate body, including a trust; or 40
 - (b) acquire or hold an interest in a company or any other corporate body, including a trust.
- (2) Subsection (1) does not apply to—
- (a) listed corporate securities acquired by a municipal entity for investment purposes in accordance with the Municipal Finance Management Act; or 45
 - (b) a fund for the benefit of employees of a municipal entity in terms of a law regulating pensions or medical aid schemes.”.

Repeal of section 94 of Act 32 of 2000

28. Section 94 of the principal Act is hereby repealed.

Insertion of item 14A in Schedule 2 to Act 32 of 2000

29. The following item is hereby inserted in Schedule 2 to the principal Act after item 14:

5

“Disciplinary steps

14A. (1) A breach of this Code is a ground for dismissal or other disciplinary steps against the staff member concerned.

(2) Such other disciplinary steps include—

10

- (a) suspension for a period not exceeding 12 months without pay;
- (b) demotion;
- (c) transfer to another post;
- (d) reduction in salary, allowances or other benefits; or
- (e) an appropriate fine.”

15

Transitional provisions

30. (1) If a municipality on the date on which this Act takes effect is in contravention of section 86B(2) of the principal Act as inserted by section 19 of this Act, the municipality must promptly take all reasonable steps to rectify its position.

(2) If a municipality referred to in subsection (1) holds an interest in any company or other corporate body not permitted in terms of the said section 86B(2), the municipality must dispose of its interest or otherwise rectify the matter as soon as may be reasonable in the circumstances.

20

(3) If a municipal entity on the date on which this Act takes effect is in contravention of section 93K(1) of the principal Act as inserted by section 27 of this Act, the municipal entity and its parent municipality must promptly take all reasonable steps to rectify its position.

25

(4) If a municipal entity referred to in subsection (3) holds an interest in any company or other corporate body not permitted in terms of the said section 93K(1), the entity must dispose of its interest as soon as may be reasonable in the circumstances.

30

(5) If, before this Act took effect—

- (a) a municipality or municipal entity had established a company referred to in section 21 of the Companies Act, 1973 (Act No. 61 of 1973), the municipality or the parent municipality of the municipal entity may, despite that Act, pass a by-law converting the company into a service utility under the sole control of the municipality or parent municipality; or
- (b) two or more municipalities had established a company referred to in section 21 of the Companies Act, 1973 (Act No. 61 of 1973), those municipalities may, despite that Act, enter into an agreement converting the company into a multi-jurisdictional service utility under the shared control of those municipalities.

35

40

(6) A by-law referred to in subsection (5)(a) and an agreement referred to in subsection (5)(b)—

- (a) must substantially comply with sections 86I(2) and 89, respectively, of the principal Act; and
- (b) may provide for such transitional and other provisions as may be necessary to effectively convert the company into a service utility or multi-jurisdictional service utility, as the case may be.

45

(7) The National Treasury may direct that a company or other corporate body referred to in subsection (2), (4) or (5) must, for the purposes of this Act and the Municipal Finance Management Act, 2003, be regarded as a municipal entity until the matter is rectified.

50

Short title and commencement

31. This Act is called the Local Government: Municipal Systems Amendment Act, 2003, and takes effect on a date determined by the President by proclamation in the *Gazette*.

MEMORANDUM ON THE OBJECTS OF THE LOCAL GOVERNMENT: MUNICIPAL SYSTEMS AMENDMENT BILL, 2003

BACKGROUND TO BILL

As a result of the nature of the provisions of the Local Government: Municipal Finance Management Bill that is currently before Parliament, certain amendments to the Local Government: Municipal Systems Act, 2000 (Act No. 32 of 2000), are required. A decision has been taken that these consequential amendments should be addressed in a separate Bill, and not as part of the Local Government: Municipal Finance Management Bill. The Local Government: Municipal Systems Amendment Bill, 2003 ("the Bill"), contains these amendments.

CONSULTATION

The National Treasury was consulted and the Bill was published in the *Gazette* in terms of section 154(2) of the Constitution on 27 June 2003 for public comment.

FINANCIAL IMPLICATIONS FOR STATE

Financial implications are not quantifiable at this stage, but will depend on the extent of the implementation of various provisions of the Bill by the three spheres of government.

IMPLICATIONS FOR PROVINCES

There are no direct implications for provinces.

IMPLICATIONS FOR MUNICIPALITIES

The implementation of the provisions of the Bill will facilitate effective corporate governance systems of municipalities and will streamline the execution of assigned functions and powers to municipalities as well as facilitating service delivery through provisions relating to matters such as service delivery agreements and the establishment of municipal entities. The implications pertaining to the implementation of these provisions will depend on the extent to which they are applicable to specific municipalities.

PARLIAMENTARY PROCEDURE

The Department of Provincial and Local Government and the State Law Advisers are of the opinion that the Bill must be dealt with in accordance with the procedure prescribed by section 75 of the Constitution. The Bill does not fall within a functional area listed in Schedule 4 to the Constitution, nor does it provide for legislation envisaged in the sections referred to in section 76(3) of the Constitution. Although the Bill provides for legislation envisaged in Chapter 13 of the Constitution, the Bill does not affect the financial interests of the provincial sphere of government.