

Comment by the Public Service Accountability Monitor (PSAM) on the Local Government: Disciplinary Code and Procedures for Senior Managers.

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The Public Service Accountability Monitor (PSAM) is a programme of the Centre for Social Accountability (CSA) and has been engaged in social accountability monitoring since 1999. The PSAM aims to improve public service delivery and the progressive realisation of constitutional rights by using various social accountability monitoring tools (which relate to resource allocation, strategic planning, performance monitoring, expenditure management, integrity and oversight processes).

These tools have been developed in order to systematically monitor the public resource management cycle and enable citizens to hold government officials accountable for the delivery of services and the performance of their duties.

We welcome the opportunity to provide comment on the Local Government: Disciplinary Code and Procedures for Senior Managers which was publicized in General Notice No.1568 of 2009 contained in Government Gazette No.32746 dated 27 November 2009.

Our comments are as follows:

1. At the outset we note that the proposed Code and Procedures for Senior Managers seeks to introduce a mechanism for ensuring that municipal councils play an integral role in determining whether to institute disciplinary action against senior managers. This is apparent from the following provisions of the draft regulations:

- The definition of “employing municipality” as contained at regulation 1(d);
- The definition of “municipal council” as contained at regulation 1(g);
- Regulation 4(1): “... the employing municipality must institute disciplinary action...”;
- Regulation 4(3): “the maintenance of discipline is the responsibility of the employing municipality”;
- Regulation 4(7);
- Regulations 5(1) to 5(4);
- Regulation 6;
- Regulation 7;
- Regulation 12(3).

In the absence of an explanation, it appears as if the proposed mechanism has been informed by reliance upon certain provisions of the Local Government: Municipal Systems Act 32 of 2000 (hereinafter referred to as the MSA) read in conjunction with section 151(2) and s160(1)(d) of the Constitution.

Section 55(1)(e) of MSA empowers a municipal manager to appoint staff except senior managers in that section 56(a) determines that senior managers are appointed by the **municipal council** “*after consultation with the municipal manager*”.

Whilst municipal council’s have the right to appoint senior managers, the MSA is quite clear in legislating that senior managers are directly accountable to the municipal manager and in fact are required by section 57(2)(c), to conclude a performance agreement with the municipal manager as opposed to the council.

Section 55(g) goes further to determine that the municipal manager is, “*subject to the*

policy directions of the municipal council, responsible and accountable for – maintenance of discipline of staff.”

The PSAM is of the view that the proposed regulations do not sufficiently involve the municipal manager during the investigative and disciplinary mechanisms directed at senior managers suspected of misconduct.

The regulations will place the onus on the municipal council which may not be best placed to arrive at the appropriate decision without the involvement of the municipal manager. The latter is well placed given that he/she is the administrative head of a municipality whose senior managers are directly accountable to him/her.

As currently framed the regulations may even frustrate the municipal manager's responsibilities contained in the Local Government Municipal Finance Management Act 56 of 2003 (hereinafter referred to as the MFMA) which he/she must abide by as required by section 55(2)(c) of the MSA. The draft regulations will conflict with the following MFMA obligations of the municipal manager:

- s.62(1). The accounting officer of a municipality is responsible for managing the financial administration of the municipality, and must for this purpose take all reasonable steps to ensure –
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 - (e) that disciplinary or, when appropriate, criminal proceedings are instituted against any official of the municipality who has allegedly committed an act of financial misconduct or an offence in terms of [Chapter 15](#); and

The proposed regulations exclude a municipal manager from any determination as to whether an investigation or disciplinary hearing against one of his/her senior managers should be undertaken.

Having considered the legal position which exists within other tiers of government, and after due consideration of the accountability arrangements that already exist at local government level, the PSAM recommends that the onus be placed on a municipal manager to commence with disciplinary action against senior managers where an investigation warrants this. The role of the municipal council should be to ensure effective oversight over the municipal manager. This may necessitate that section 56(a) of the MSA be amended to allow for the appointment of senior managers by the municipal manager.

2. As regards Regulation 5(4)(v)(aa), we would like to suggest the deletion of the words “accused” and “may” and their substitution so that the proposed regulation reads as follows:

*“**found guilty** of the same or related transgression, this written warning **must** be taken into account in deciding an appropriate sanction or”*

3. As regards Regulation 5(4)(v)(bb), we would like to propose its deletion in entirety.

4. As regards Regulation 7(1)(a) we would like to propose the addition of the following sentence:

“The written complaint must be considered with due regard for the provisions of the Protected Disclosures Act 26 of 2000.”

5. As regards Regulation 9(4)(c) we would question whether it is appropriate to direct that the prosecutor *“must: cross examine any witness called to testify on behalf of the senior manager.”*
6. As regards Regulation 15(1), we would like to propose the addition of the following bold text:

*15(1) If its is alleged that a senior manger is not capable of carrying out the duties attached to his or her post or **is** incapable of carrying out those duties efficiently, the employing municipality must assess the capacity of the senior manager and may take action against the senior manager in accordance with **this** Code and Procedures, **after having considered:***

(a) The Regulations on Minimum Competency Levels as contained in Government Notice R493 in Government Gazette 29967 of 15 June 2007, specifically regulations 6 and 7 thereof;

(b) Section 171(3) of the Local Government Municipal Finance Management Act 56 of 2003.

7. As regards Annexure A, we note that the list is not exhaustive. We would however prefer that the following act of misconduct be specifically mentioned:

“contravenes the Prevention and Combating of Corrupt Activities Act 12 of 2004”

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