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Building a competency framework for the professionalisation of Local Government in SA

A presentation submitted to the National Council of Provinces (NCOP) *

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1. Introduction

In the past 21 years of democratic local government, the government of South Africa, led by the national government, has taken a variety of steps to professionalise the local government sector, particularly when it comes to senior managers. These steps have focused on improving the competency of senior managers. Various laws, both primary and secondary legislation have been enacted aimed at building a competency framework for local government. There is, for instance, the Municipal Finance Management Act and its regulations, the Municipal Systems Act and its regulations, and the Public Administration Act and its possible regulations.

Yet, despite all these laws and regulations, there are still major problems with the competent administration of municipalities. In this presentation, we contend that there are enough laws and regulations. Even too much law. We argue that the way regulations are issued, and their content may be an important factor that inhibits the professionalisation of local government. Indeed, we argue that regulations, instead of helping us to solve the problem of

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professionalisation, may in fact inhibit us from doing so owing to a number of regulatory pathologies. Our desktop and empirical evaluation of the competency framework demonstrates that laws and regulations are frequently not properly thought through, which results in the formation of overlapping and at times contradictory laws, among other problems.

So, what should we do? How exactly can Parliament find a solution to these problems? First and foremost, the presentation urges the Parliament to take its oversight role more seriously, as required by section 101(4) of the Constitution, and to do so by scrutinising regulations that are directed toward local government. It further calls on Parliament to re-establish the joint committee on the scrutiny of delegated legislation, which since 2014 no longer exists. Finally, the paper calls for a systemic approach to law-making, which requires policy-makers and lawmakers to assess the impact of regulations, especially those aimed at local government. We do not argue for deregulation, however, we call on the government to embrace Better Regulation approaches and methods of law-making.

2. Legislative Pathologies and Problems in the Competency Framework

It is a well-known fact that one of the most significant challenges- confronting municipalities is the fact that many of them lack the desirable skill set necessary to satisfy the requirements of their residents in terms of service delivery. This is a result of many causes: cadre deployment, nepotism, availability of skilled persons, etc. One of the main responses has been a legal one: draft legislation that will force municipalities to get the right skills set for the job. There are many parliamentary laws, there are even many more regulations issued by ministries constituting the competency framework for municipal employees. So, why are we discussing the problem of professionalisation of local government today given this comprehensive framework? Why are so many municipalities dysfunctional? Why do so many municipalities have poor audit results?

The competency framework for local government set out in law gives rise to a number of pathologies. These pathologies are not unique to South Africa or limited to the competency framework. In fact, these legislative problems have manifested themselves in other areas of our law such as the Public-Private Partnership regime, and have been recognised globally. There have been global efforts aimed at addressing these problems. So, what are these problems or pathologies?

We find that many of legislative problems, listed below – general concerns, have also manifested themselves in the regulations establishing the competency framework for municipal employees. We provide several examples below; however, this is in no way meant to be an exhaustive list.

2.1.1 Generalisation/ Overuse of rules

To begin, there is the belief that problems that arise in practice can be resolved by passing additional laws and regulations. This is a misconception. By way of example, if a problem pops up in one municipality – the problem is not addressed in that municipality or municipalities through executive intervention. Instead, the isolated problem is addressed by making a law of general application to all other municipalities. Two issues arise:

(1) Will the new legislation solve the problem where it occurred? Evidence suggests that this is often not the case.

(2) The legislation due to its general application also creates a burden on those municipalities (the majority) where there was no problem in the first place. These municipalities (well-performing) must carry the cost of compliance without any real purpose served.

In essence, we argue that it is a case of over-use of law when executive interventions would have been sufficient and more efficient to fix an isolated problem.

2.1.2 Lack of Differentiation

Second, the regulatory regime aimed at municipalities reflects the assumption that all municipalities are the same: the same: size, infrastructure, economic viability, same skill set. The approach is “One size fits all”. Because this is a false assumption, the outcome of legislative compliance will be varied: some municipalities will comply, others - half compliance, or no compliance. In effect, we find that the legal framework as it stands lacks differentiation. This is notwithstanding the fact that the Minister of COGTA and Finance, has the power in law (Systems Act and MFMA) to issue regulations that differentiate between municipalities.

2.1.3 Implementation of regulations is made impossible because of a too high demand on time and resources

For many municipalities, implementing the regulations is difficult as the regulations assume that all municipalities have the same resources and skills. For instance, if you maintain the

same high standard of accounting standards throughout all municipalities, the ones with fewer financial resources and skill sets will not be able to keep up. In fact, we have witnessed, and the Auditor General has stated, that a great number of municipalities rely on the services of consultants when preparing their financial statements for auditing.

Another example is the rules regulating PPPs at a municipal level. Many municipalities, including well-resourced, are finding the PPPs regime complex and unfordable resulting in that is hardly ever used. Our research finds that only 4 PPPs have been successfully completed at a municipal level since 2003.

2.1.4 Inflexible rules - too many commands

Fourth, we found that the legal framework prescribed every aspect of municipal administration in detail, often with prescriptive commands through the usage of the words 'musts.' This gives rise to a number of consequences. First, if a municipal manager (MM) fails to comply with a prescriptive rule, he may be prosecuted and sent to jail for 5 years. The result is that some MM concentrates only on keeping his or her nose clean, irrespective of the costs in meeting compliance. This is often at the expense of service delivery as resources for compliance are pushed away from service delivery. The usage and costs incurred by local government when using the services of consultants is a case in point.

Another consequence is that prescriptive rules, especially where it is drafted without care (i.e., consequences of non-compliance are not clear) invite litigation. This is the case when an obligation (a must) is not met and thus the action is invalid. For example, a farmer who does not want to pay property rates on the farm, attacks the property rates notice because it was not displayed at the local library (which the Systems Act says it must). As a consequence of this, every prescriptive step may be reviewed by the courts, which causes municipalities to procrastinate when making decisions.

Example: Over-prescription lead to abuse

There have been several instances where the competency rules due to their prescriptive and inflexible formulation have been abused and weaponised to settle political battles, thus hindering the professionalisation of LG.

- The former DPLG Director-General, Dr. Msengana-Ndlela appointment as a City Manager comes to mind, as an instance where her opponents challenged her appointment because she had not completed the Municipal Finance Management Programme as prescribed by the Competency Regulations.
- Through the usage of 'must' there is an assumption that regulations will be implemented – all municipalities have the capacity and resources to implement the

minimum competencies requirements. But by January 2020, only 128 of the 248 Chief Financial Officers (CFOs), who oversee the Budget and Treasury Office within a municipality, have met the requirements for a CFO. A quarter of CFO positions are vacant.

2.1.5 Lack of Legislative Coordination

Fifth, our research reveals that there is a lack of legislative coordination between different national departments, particularly when two departments issue regulations on the same matter. We found that national departments operate in silos and often find themselves fighting for regulatory control over local government. The result is conflicting or contradictory regulations, including duplicative and overlapping rules (both the Municipal Systems Act and MFMA deal with PPPs).

There have also been instances of duplication of reporting requests, with each department – national and provincial – requesting the same information from municipalities. We found that there is an assumption that municipalities have infinite time and resources to report. Because there is so little likelihood of receiving input on reports, municipal officials generally view report-writing as a pointless endeavour.

Example: **Lack of Harmony in the Competency Framework**

- **Overlapping**: We have witnessed a regulatory turf battle between COGTA and National Treasury, resulting in overlapping regulations.
    - For example, in 2004 COGTA issued Performance Regulations, which included competency requirements. In 2007, National Treasury also issued regulations dealing with Minimum Competency Levels with an implementation date of 2013. COGTA, again in 2011 and 2014 issued two sets of regulations dealing with the Appointment and Conditions of Service of Senior Managers.
        - **Note,** the Department of Public Service and Administration – in terms of the Public Administration Management Act, is also able to impose further competency requirements.
        - After 9 years, the latest reports reveal that less than half of MMs have those qualifications. Same with CFOs, and SCM managers.
- **Contradictory Provisions.** Furthermore, the regulations that govern the qualification criteria for senior managers have been shown to have inconsistencies.
    - For example, Cogta's Performance Regulations prescribe that a bachelor's degree is required for all senior municipal managers. National Treasury's (NT) Minimum Competency Regulations differentiate between municipalities according to their budget size, requiring lower qualifications for smaller municipalities. Similarly, NT's Minimum Competence Regulations prescribe a certificate in municipal financial

management as a mandatory requirement, whereas COGTA's Appointment Regulations do not.

- Municipalities are thus left to decide which rules they apply and which they ignore, resulting in legal uncertainty, confusion and non-compliance.

- **Duplication**
  - There are also several instances where the laws duplicate each other. Both the Systems Act and the Public Administration Management Act prohibit public servants from conducting business with the state. (See Code of Conduct for Municipal Staff, who regulates this issue in detail.) Similarly, NT's Financial Misconduct Regulations repeat the Department of COGTA's Disciplinary Regulations, which deal with all types of misconduct and the Code of Conduct for Municipal Staff Members.
    - We note that the DPSA is likely to add regulations on conduct and ethics governing all public employees in accordance with PAMA, which may lead to more duplication.

2.1.6 The likely impact/consequences of regulations not thought through

Our research shows that the impact of laws imposed on municipalities is not properly thought through prior to their implementation. The traffic law - Administrative Adjudication of Road Traffic Offences Act (AARTO) recently declared unconstitutional is a case in point. The law cuts the revenue stream of municipalities, as it requires revenue generated from traffic fines, to be shared with a national agency, making it no longer profitable for municipalities to collect fines.

Example of Legislative instrument inhibiting professionalisation

To deal with the remuneration disparities across all municipalities, unjustified high remunerations, the government established regulations to set **uniform remuneration** framework across all the municipalities.

Our research shows that small rural municipalities which require the best skills cannot attract the best. The result is that it did not address the high vacancy rates and capacity shortages in municipalities.

2.1.7 Overall burden/ Cumulative Impact

The objections raised by the municipalities are not only restricted to a single body of legislation or specific law in any way. On the other extreme, municipalities have a broad complaint that is geared against the sheer volume of things they are forced to perform, as a result of laws and circulars.

In point of fact, the laws and regulations that are imposed on municipalities impose a tremendous weight on municipalities when combined together. As a result, this load prevents municipalities from being innovative and proactive. We discover, for instance, that local governments are exposed to a greater number of regulations and control mechanisms when compared to their counterparts in national and provincial governments.

3. What can be done?

Much of the law regulating local government is done **through regulations**. So, how can we make better regulations? Moreover, what institution should drive this process?

The argument is not for de-regulation, but for more effective and efficient legislation. Smart legislation: Before enacting legislation, we should ask a few questions:

- Is legislation necessary, or would executive intervention be much more effective?
- Is the legislation harmonious, or are they in silo?
- Is there duplication?
- Has the likely impact been thought through?
- Is it implementable given the cost and personnel implications?
- Cooperative government – Has local government been consulted?

We contend that one of the institutions that have the potential to play a significant role is Parliament. Parliament is given a unique responsibility, as outlined in section 101(4) of the Constitution, which reads as follows:

> National legislation may specify the manner in which and the extent to which [proclamations, regulations and other instruments of subordinate legislation] must be –
>
> a) tabled in Parliament; and
>
> b) approved by Parliament.

This provision is an expression of Parliament's oversight role over the executive. In as much as Parliament adopts legislation, so it may approve delegated or subsidiary legislation of the national government's departments. The reference to Parliament includes, of course, the NCOP.

It may thus scrutinise regulations against a set of principles of good government. Since the enactment of the 1996 Constitution, bringing this section to life has been slow. For example, in 1999, Parliament established a Joint Subcommittee on Delegated Legislation to investigate

Parliament's oversight role of subordinate legislation. A report was prepared by Prof Hugh Corder, who recommended that legislation be enacted to provide for norms and standards for the tabling and approval of delegated legislation. The report recommended, amongst other things, that all delegated legislation must be tabled in Parliament; go through a procedure for approval or disapproval by Parliament after being examined by a committee against certain standards; and the executive authority proposing the delegated instrument must conduct a cost-benefit analysis or impact study.

Following Corder's report, the Joint Rules Committee in 2011 decided to form an Interim Joint Committee on Scrutiny of Delegated Legislation. The Committee between 2012 and 2014 scrutinised a few regulations such as the National Road Traffic Act Regulations of 2000.

- The Committee used criteria including following:

  (b) whether regulations comply with procedural aspects pertaining to delegated legislation;

  (e) whether they conform with the objects of the parent Act;

  (f) whether they appear to make unusual use of powers conferred by the parent Act;

  (g) whether they have been properly drafted;

  (h) whether they trespass on the Bill of Rights; or

  (i) whether they amount to substantive legislation

We note that the Interim Joint Committee on Scrutiny of Delegated Legislation was not continued in the fifth Parliament of 2014, despite its extension being recommended in the fourth Parliament's legacy report. In absence of Parliamentary Act, no systematic scrutiny of regulations is now taking place. Depends on whether an Act itself requires parliamentary approval.

4. Conclusion

In conclusion, our plea to Parliament, and the NCOP in particular, is that it take up again the task of scrutinising regulations. In the case of the competency framework for municipal staff, it is vital. The aim is to have a coherent framework that produces better administration, to minimise a silo approach to law-making.

We propose that Parliament adopt a framework for testing whether a law or regulation is necessary. It requires an impact assessment. It may ask the following questions:

a. Can the problem be solved without resorting to legislation?

b. What is the likely cost of the regulation?
c. What are the likely consequences of the regulation – that can be foreseen?