

INFORMATION SERVICES: RESEARCH

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15 March 2007

Briefing Document: Bulk Resources for Municipal Services: Municipal Finance Management Act No. 56 of 2003 The Case for Water Boards

1. Introduction

The Municipal Finance Management Act (MFMA) promotes cooperative approaches to fiscal and financial management across government. In the spirit of cooperative governance, the MFMA requires organs of state that supply bulk resources to consult on pricing policies that impact on municipal services.

Section 42 of the MFMA requires extensive consultation before an organ of state can increase the price of a bulk resource supplied to a municipality or municipal entity. This forms part of government's effort to ensure consistent policy implementation and achievement of macro economic objectives. This process is comprehensive and must be completed on time, and contain motivations to be tabled in Parliament or the relevant provincial legislature. Careful planning is required to meet the obligations of the MFMA before the pricing amendments can take effect.

It is also a requirement of the MFMA that tariff adjustments be tabled in Parliament on or before 15 March of each year by the Executive Authority responsible for that public entity, the Minister of Water Affairs and Forestry in the case of water boards, and must be accompanied by comments from the municipalities, the National Treasury and the South African Local Government Association (SALGA). This is to enable the adjustments to be effective on 1 July of the same year. Failure to do that may delay the increase in tariffs for a period of a year, which means that the increase will only take place on 1 July of the following year, unless approved otherwise by the Minister of Finance.

2. Background

Government generally and municipalities specifically are a major provider of essential services to communities. The ongoing financial sustainability of these institutions is important to meet national, provincial and local objectives. Significant reforms contained in the Municipal Finance Management Act (MFMA) require municipalities to be more transparent demanding minimum levels of reporting and accountability. All municipal budgets must now be tabled before council no later than 31 March and adopted before 1 July, providing improved certainty in the process. As the purchase of bulk services

makes up a significant component of municipal expenditure (approximately 25%), and will impact directly on the tariff policies adopted by council, it is imperative to coordinate and finalise the pricing from bulk resource providers in a timely manner. Municipalities and bulk service providers are also encouraged to take into account government's broad economic objectives and adhere to the inflation targets when concluding their bulk and retail tariffs.

The MFMA provides the following two significant features in relation to the provision of electricity, water and other bulk resources to municipalities and municipal entities:

- Firstly, if an organ of state intends to increase the price of such resource, it must undertake a comprehensive consultation process to be completed on or before 15 March in any year. Failure to complete the consultation process by 15 March in any year will delay the price increase by twelve months until 1 July the following year (section 42).
- Secondly, and to complement the consultation process, the National Treasury is required to monitor the pricing structures and payments made by municipalities and municipal entities to organs of state for the supply of bulk resources. To do this, organs of state are required to submit monthly statements to the National Treasury setting out payments received, arrears and any action taken to recover arrears from municipalities and municipal entities.

3. Price increases of bulk resources for provision of municipal services (section 42)

Section 42 of the MFMA, effective from 1 April 2005, sets out a comprehensive consultation process to be followed by organs of state before the pricing of bulk resources supplied to municipalities and municipal entities can be increased. It is incumbent on the organs of state to follow this procedure as failure to do so will delay or possibly invalidate any price increases. This process is in addition to any other regulatory processes prescribed, that is, the National Electricity Regulator (NER) for electricity.

Organs of state must complete consultation on price increases no later than 15 March of any year if the increase is to take effect from 1 July of the same year. If the process is not completed by 15 March, the price increase will be delayed for 12 months. By working back from 15 March, the various consultation processes can be planned to ensure the process is finalised in good time. The following table provides a guide to assist with the consultation process:

Action	Date
<p>Step 1</p> <p>The organ of state (bulk provider) should consult with all municipalities and municipal entities within their supply area on proposed pricing increases. This would ideally take the form of a meeting or workshop at which relevant motivations supporting the increases are tabled and explained, allowing opportunities for questions and feedback.</p> <p>Municipalities at this stage to consider and plan ahead for compliance with other regulatory processes prescribed for setting municipal tariffs, that is NER for electricity.</p>	October and November
<p>Step 2</p> <p>A request must be lodged with the National Treasury and organised labour government (SALGA) seeking written comments on the proposed pricing increase. This request should be accompanied by sufficient information to enable constructive comments, such as that information required in step 3 below and feedback from consultation with municipalities and municipal entities from step 1 above.</p>	No later than 1 December
<p>Step 3</p> <p>National Treasury and SALGA provide written comments on the proposed pricing increase.</p>	No later than 25 January
<p>Step 4</p> <p>No sooner than 40 days after lodging the request with National Treasury and SALGA, the organs of state must lodge a 'submission' on the proposed pricing increase to:</p> <ul style="list-style-type: none"> • Its executive authority within the meaning of the Public Finance Management Act. • Any regulatory agency for approval, if national legislation requires such approval, for example, NER for electricity. <p>Such submission must be accompanied by:</p> <ul style="list-style-type: none"> • A motivation of the reasons for the proposed amendment. • An explanation of how the amendment takes account of: <ul style="list-style-type: none"> - Government's inflation targets and other macro economic policy objectives. - Steps taken by the organ of state to improve its competitiveness of efficiency in order to reduce costs. • Any written comments received from the National Treasury, organised local government or any municipalities. • Explanation of how such comments have been taken into account. 	25 January
<p>Step 5</p> <p>The executive authority of the organ of state must table the pricing amendments and the documents referred to in 3 above in Parliament or the relevant provincial legislature, as may be appropriate.</p>	15 February
<p>Step 6</p> <p>Unless approved otherwise by the Minister, an amendment to a pricing structure, which is tabled in Parliament or the relevant provincial legislature:</p> <ul style="list-style-type: none"> • On or before 15 March in any year, does not take effect for the affected municipalities or municipal entities before 1 July in that year, or • After 15 March in any year, does not take effect for the affected municipalities or municipal entities before 1 July the next year. 	1 March
<p>Step 7</p> <p>The organ of state (bulk provider) must notify in writing all municipalities and municipal entities of the price increase</p>	15 March
<p>Step 8</p> <p>Municipalities to comply with other regulatory processes prescribed for setting municipal tariffs, that is, NER for electricity.</p>	As soon as possible after 15 March
<p>Step 9</p> <p>Municipality to table draft budget before council.</p>	No later than 31 March

4. Monthly reporting by organs of state

Section 41 of the MFMA requires the National Treasury to monitor the pricing structure of organs of state for the supply of electricity, water or any other bulk resources to municipalities and municipal entities and payments made for such bulk resources.

Each organ of state providing such bulk resources to a municipality must within 15 days after the end of each month furnish the National Treasury with a written statement setting out, for each municipality in that province or for each municipal entity providing municipal services on behalf of such municipalities:

1. The amount to be paid by the municipality or municipal entity for such bulk resources for that month, and for the financial year up to the end of that month.
2. The arrears owing and the age profile of such arrears.
3. Any actions taken by the organ of state to recover arrears.

National Treasury is working on an automated reporting requirement, and to this end, organs of state are invited to submit suggested electronic formats and fields of incorporation into an agreed format for submission.

5. Disputes between organs of state (section 44)

In cases of disputes arising between a municipal or municipal entity and organs of state, including bulk suppliers, this matter must be first referred to the sector department regulating the bulk supplier, for example, matters related to electricity are to be referred to the Department of Minerals and Energy, matter concerning water and sanitation to the Department of Water Affairs and Forestry, etc.

If the National Treasury is not a party to the dispute, the parties must report the matter to the National Treasury and may request the National Treasury to mediate between the parties or to designate a person to mediate between them. If the National Treasury accedes to a request, the National Treasury may determine the mediation process. This process is detailed in the *MFMA Circular No 21* (see Annexure 1) on disputes between organs of state.

6. Conclusion

In the spirit of cooperative governance, it is incumbent on organs of state to undertake a fair and comprehensive consultation programme. This should commence with discussions with municipalities and municipal entities around October/November of each year, to be followed by formal submissions to a range of statutory authorities prior to tabling in Parliament or the relevant provincial legislature. Failure to complete this process by 15 March of each year will delay the proposed increases for 12 months, thus making it essential for organs of state to carefully plan the consultation process.

Source

Public Finance Management Act No.56 of 2003, MFMA Circular No 23



Section 44 – Disputes between organs of state

Introduction

Section 44 of the Municipal Finance Management Act No. 56 of 2003 (MFMA) is intended to create an additional remedy to resolve disputes between organs of state. The provision enhances the spirit and principles of co-operative governance as entrenched in Chapter 3 of the Constitution of the Republic of South Africa, the requirements of section 44(1) of the MFMA and the Intergovernmental Relations Framework Bill, 2004.

Since the commencement of section 44(2)(b) of the MFMA in July 2004, a number of organs of state have requested the National Treasury to mediate financial disputes that arose between them. From these requests it is clear that guidance is required as to:

- the application and implications of section 44;
- the circumstances and processes to be followed before the National Treasury is likely to agree to mediate disputes in terms of section 44(2)(b).

What does section 44 require?

The parties to the dispute must:

- take all reasonable steps that may be necessary to resolve the matter out of court;
- report the dispute to the National Treasury; and
- if National Treasury is not party to the dispute, the parties may request the National Treasury to mediate or designate a person to mediate the dispute.

When does section 44 apply?

It applies where a *dispute of a financial nature* has arisen between two or more *organs of state* of which *at least one is a municipality or municipal entity*.

What is a dispute of a financial nature?

A dispute exists when one organ of state maintains a point of view and the other organ of state a contrary or a different view (i.e. the organs of state disagree with each other). In addition, the dispute must be capable of judicial proceedings by either party (i.e. must be justiciable in a court of law.)

A dispute of a *financial nature* relates to disputes arising from:

- financial implications or consequences relating to the exercise of statutory or assigned powers or functions; or
- the financial rights and obligations in terms of an agreement (contract) between organs of state regarding the implementation of statutory powers or functions.

To which organs of state does section 44 apply?

A municipality, a municipal entity and an organ of state in the national or provincial sphere of government may be a party to a dispute of a financial nature.

Section 44 also applies to disputes within local government (that is disputes between municipalities, between municipal entities or between municipalities and municipal entities) and is not limited to disputes between organs of state in different spheres of government or intergovernmental disputes.

What are the implications of the Intergovernmental Relations Framework Bill, 2004 for disputes of a financial nature?

In terms of section 36(1)(a) of the Intergovernmental Relations Framework Bill, 2004, as published for public comment in Government Gazette 26970 dated 5 November 2004, the Bill does not apply to the resolution of intergovernmental disputes where other national legislation provides mechanisms or procedures for the resolution of such disputes.

Section 44(2)(b) of the MFMA provides an alternative mechanism for the resolution of disputes of a financial nature. The Bill will therefore not apply in respect of financial related disputes unless the Bill is otherwise amended prior to enactment.

What are the implications of section 44 for agreements?***Existing contractual provisions providing for dispute resolution mechanisms?***

Existing written agreements between organs of state that provide for the settlement of disputes by judicial proceedings only, are inconsistent with the principles of co-operative government provided for in the Constitution and contravene section 44(1) of the MFMA in respect of disputes of a financial nature. These agreements should be amended accordingly to reflect the requirements of the MFMA.

Where existing written agreements between organs of state provide for dispute resolution mechanisms or procedures, other than approaching the courts, the parties must make use of those mechanisms.

What should be provided for in future contractual provisions in respect of dispute resolution mechanisms?

The remedy created by section 44(2)(b) of the MFMA should be provided for in future agreements and be negotiated between organs of state in respect of disputes of a financial nature. Any mediation provisions should enable the parties to request the National Treasury to mediate or to designate a person to mediate such disputes.

However it is important that alternative dispute resolution mechanisms are provided for in the event of the National Treasury not acceding to a request to mediate.

A hierarchy of remedies could be provided for, such as –

- an amicable settlement;
- mediation by the National Treasury;
- mediation by another person, where the National Treasury does not accede to a request;
- arbitration.

What steps should be followed prior to requesting the National Treasury to mediate a dispute?

It is recommended that, prior to the National Treasury being requested to mediate a dispute of a financial nature, the following minimum steps be taken:

1. Where the dispute is between a municipality and another municipality or municipal entity:
 - ✓ The accounting officers of the municipalities or municipality and municipal entity must attempt to meet to settle the matter amicably through a process of negotiation. If the negotiations fail or no meeting has taken place within 30 days, or another period agreed upon, the officers must refer the matter to the mayors or mayor and chairperson of the board of directors of the municipal entity.
 - ✓ All parties must report the dispute to the National Treasury.
 - ✓ When referred, the mayor(s) of the municipality and the chairperson of the board of directors of the municipal entity must attempt to meet to settle the matter amicably through a process of negotiation. If the negotiations fail or no meeting has taken place within 30 days, or another period agreed upon, the parties may elect to refer the matter to the Provincial Treasury.
 - ✓ After the lapsing of 60 days or all efforts by the Provincial Treasury have failed then the MEC for Finance in the Province should refer the matter to the Premier of the Province for resolution.
 - ✓ Should no amicable solution be found then the matter should be referred to the National Treasury for resolution.

2. Where the dispute is between a municipality or municipal entity and a provincial or national organ of state (department or public entity):
 - ✓ The oversight and governance structure between the parent municipality and the entity must be maintained. Hence the accounting officer of the municipal entity must report the dispute to the accounting officer of the parent municipality. The accounting officer of the municipal entity may request the accounting officer of the parent municipality to support the accounting officer of the entity in addressing the dispute or to address the dispute on behalf of the entity.
 - ✓ All parties must report the dispute to the National Treasury.
 - ✓ The accounting officer of the municipality (or entity) and the accounting officer of the relevant department or chief executive of the relevant public entity must attempt to meet to settle the matter amicably through a process of negotiation. If the negotiations fail or no meeting has taken place within 30 days, or another period agreed upon, the officials must refer the matter to the mayor, chairperson of the board of the municipal entity, the political head of the department or the chairperson of the board of the public entity (accounting authority), depending on the parties to the dispute.
 - ✓ When referred, the mayor, political head or chairperson/s must attempt to meet to endeavour to settle the matter amicably through a process of negotiation. If the negotiations fail or no meeting has taken place within 30 days, or another period agreed upon, the parties must elect to refer the matter to the Provincial Treasury.
 - ✓ After the lapsing of 60 days or all efforts by the Provincial Treasury have failed then the MEC for Finance in the Province should refer the matter to the Premier of the Province for resolution.
 - ✓ Should no amicable solution be found then the matter should be referred to the National Treasury for resolution.

It must be noted that any cost associated with resolving the dispute between the parties will have to be met by the parties concerned.

What information must be provided to the National Treasury?

Informing the National Treasury of a dispute – section 44(2)(a)

The mayor, political heads and chairperson of a board of a municipal entity must report a dispute to the National Treasury in writing.

The following information should accompany the report:

- a detailed description of the dispute;
- the dispute resolution mechanisms available to the parties; and
- the steps taken to resolve the dispute.

All reports must be made by the organs of state themselves and not their external legal representatives acting on their behalf.

Requesting the National Treasury to mediate a dispute – section 44(2)(b)

The following information must be provided:

- a detailed description of the dispute, including the precise issues that are in dispute;
- copies of all documentation informing the dispute; and
- the steps taken to date to resolve the dispute.

All requests must be made by the organs of state themselves and not their external legal representatives acting on their behalf.

How will the National Treasury mediation process work?

- The National Treasury will, within 30 working days of receiving a request in terms of section 44(2)(b), inform the organs of state whether it will mediate the dispute or designate a mediator, depending on the request received.
- Where the National Treasury has acceded to a request to mediate a dispute or designate a mediator, either will, within 10 working days of informing the parties, in their sole discretion determine the form of representations to be made. In making this determination, the National Treasury or designated mediator shall consult the disputing parties and may be guided by them on the form in which the representations are to be made. The parties will be required to agree:
 - that all representations by the parties shall be made without prejudice; and
 - to contribute equally to the cost of the mediator, if one is designated, and bear any other costs separately regardless of the outcome of the mediation.
- The mediator shall within, a further period of 20 working days after receipt of the representations of the parties, facilitate an agreement between them or determine a procedure or framework within which they can negotiate to resolve the dispute.
- All negotiated agreements shall be in writing, signed by both parties and be binding on the parties.
- If the parties fail to reach a satisfactory resolution, having exhausted all reasonable steps proposed by this circular, then the matter may be referred to arbitration or to a court

What happens if the National Treasury in terms of section 44 declines to mediate or to designate a person to mediate?

In the event that the National Treasury declines to mediate or to designate a mediator, the parties may, subject thereto that all reasonable steps that may be necessary to resolve the matter out of court have been taken, exercise any legal remedies available to them.

Such legal remedies may include mediation, arbitration or court proceedings. When a National or Provincial Department is involved the relevant Office of the State Attorney may also be approached for assistance.

Conclusion

This circular has been developed to guide municipalities on the intent and spirit of section 44 and to provide a fair and reasonable process in which to resolve intergovernmental disputes of a financial nature. The success or otherwise of the resolution achieved will ultimately rest with the parties to the dispute, as the Provincial and National Treasury are only empowered to mediate.

A mandate is provided in the MFMA requiring the parties to take all reasonable steps to resolve the dispute out of court. Only after all reasonable steps as proposed by the circular fail, should the matter be referred to a court.

Additional information on section 44 or this circular may be requested from the dedicated MFMA email address or to the facsimile number listed under contact below.

Contact



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25 August 2005

