

IMPLEMENTING THE Municipal Systems Amendment Act

The Municipal Systems Amendment Act was signed into law by the President on 5 July 2011 and is set to have a major impact on municipal governance. Regulations to give further substance to the Act are on their way.

The first questions about the interpretation of the Act are already emerging, and this article aims to give guidance on some of the more difficult areas. It does not provide a summary of the Act, but rather deals with certain matters of implementation.

It is important to note that the changes contained in the Systems Amendment Act do not affect contracts concluded before the Act came into operation.

Advertise to extend a contract?

The Systems Amendment Act now prescribes a basic procedure for the recruitment of municipal managers and managers reporting to the municipal manager (section 56 managers). This procedure includes advertising the post nationally and re-advertising when no suitable candidate presents himself or herself.

The question has come up: does the requirement to advertise apply to the extension of a contract? In other words, if the municipal council wants to use the relevant renewal clauses in the contract to extend the tenure of the current manager, does it need to advertise first? We argue that it does not. Advertising is required if the post 'becomes vacant'. In

the scenario mentioned above, there is no vacancy but rather a decision to continue with the incumbent.

Permanent contracts for senior managers?

Section 57(7) of the Municipal Systems Act used to provide that a municipality may extend the application of fixed-term contracts to section 56 managers. This provision has been removed from the Act. The intention of this deletion, as made clear by the Department of Cooperative Governance and Traditional Affairs, is to ensure that, in future, all section 56 managers are appointed on permanent contracts.

This intervention is commendable. Permanency in a municipality's senior management promotes much-needed stability, provided it is coupled with sound appointment and performance management processes. It will put an end to unnecessary 'purging' of municipal administrations after political changes.

In terms of section 160(1)(d) of the Constitution, municipalities may appoint their personnel – but this authority is not without limits, because the Constitution also provides that national government may regulate the functioning of municipalities, including their human resources practices (sections 155(7) and 164).

A legal problem is now emerging in the implementation of the principle of permanency for section 56 managers. SALGA argues that municipalities remain free to appoint section 56 managers on fixed-term contracts, despite the fact that section 57(7) of the Systems Act has been repealed. A related, practical problem is the fact that the terms and conditions for permanent section 56 staff are not provided for in the current bargaining council agreements.



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The counter-argument is that this is an example of national government's regulatory power over municipal governance. The intention of the Systems Amendment Act has been made clear and should be followed through. The question now is, did the repeal of section 57(7) actually make any difference to the discretion of a municipality? Municipalities were constitutionally permitted to appoint section 56 managers on fixed-term contracts, regardless of section 57(7).

The problem appears to be that the Systems Act does not specifically prohibit fixed-term appointments for section 56 managers. If it had provided that municipalities 'may not' appoint section 56 managers on fixed-term contracts, the situation would have been different. In the absence of a hard and fast rule, and given the practicalities surrounding the implementation of the principle of permanency for senior managers, it is incumbent on SALGA and the department to come to an agreement and guide municipalities accordingly.

Re-employing employees that were dismissed for misconduct

The Systems Amendment Act provides that a staff member dismissed for misconduct may only be re-employed in any municipality after a particular

period, determined by the Minister in regulations. The Minister has not yet issued those regulations.

Does this mean that, for now, a 'convicted' staff member can be re-employed in another municipality the day after his or her dismissal? We argue that this would be a violation of the law, as the law prohibits the re-employment of 'convicted' staff members until after a period determined by the Minister, so they may not be re-employed as long as that period has not been determined.

Definition of 'political office'

The Systems Act now provides that a senior manager may not hold political office in a political party. How is this defined?

The Act defines 'political office', in relation to a political party or its structures, as the position of chairperson, deputy chairperson, secretary, deputy secretary or treasurer of the

party nationally or in any province, region or other area in which the party operates. Whether the person holds such a position permanently, temporarily or in an acting capacity is irrelevant.

Furthermore, a position in a political party that bears a different name but is equivalent to any of the above positions also does not escape the meaning of 'political office' in terms of the Act.



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